

**ENFORCEMENT OF COPYRIGHT IN THE MUSIC INDUSTRY:
A CRITICAL ANALYSIS OF THE LEGAL AND
INSTITUTIONAL FRAMEWORK ON ENFORCEMENT IN SUB
SAHARAN AFRICA**

MARISELLA NABONGO OUMA

**A THESIS SUBMITTED IN FULFILMENT OF THE
REQUIREMENTS OF DOCTOR OF PHILOSOPHY, INTELLECTUAL
PROPERTY UNIT
CENTRE FOR COMMERCIAL LAW STUDIES
QUEEN MARY UNIVERSITY OF LONDON.**

SUPERVISORS

Prof. Uma Suthersanen - Queen Mary University of London (1st Supervisor)

Prof Graham Dutfield – University of Leeds (2nd Supervisor)

ABSTRACT

It is trite to state that law without effective enforcement is of no use to those it seeks to protect. Nevertheless, it must be emphasised that for a law to be effective, there have to be corresponding institutional structures. Enforcement of copyright involves two phases. The first is formulation and enactment of law. The second phase is the implementation of legal provisions that includes interpretation of law and determination of cases by the courts, investigation of copyright violations, prevention of unauthorised exploitation of the rights and the use of sanctions and remedies provided by law. The main problem for rights holders is not so much in written law but in enforcement or lack thereof. Some creative industries in sub Saharan Africa are being threatened due to unauthorised commercial exploitation of copyright protected works. This is despite strengthening of national laws in the region.

There are various reasons for the impending demise of such industries, but the crucial factor is lack of or limited enforcement. The thesis looks at the important issue of enforcement from the perspective of the music industry in sub Saharan Africa. Based on an analysis of four sub Saharan countries, namely Kenya, Nigeria, Senegal and South Africa, this thesis illustrates that despite having in place relatively modern copyright laws, these countries still experience high levels of unauthorised commercial use in respect of music. The thesis suggests that a key factor that promotes unauthorised commercial use is lack of effective enforcement. Through a critical analysis, based on the political, social, economic and technological perspectives, the thesis addresses three questions. First, why is copyright enforcement a problem in sub Saharan Africa? Secondly, why has the existing legal regime failed

to ensure effective enforcement? Thirdly, what is an effective copyright enforcement regime? Effective enforcement of copyright, from a political, economic, social and technological perspective involves the existence of enforceable law, as well as effective enforcement mechanisms in both private and public sectors. An effective enforcement regime ensures conformity to law, involves a constant review of existing legal regimes and institutional structures (such as enforcement agencies) as well as adoption of new procedures and technologies to reduce incidences of non-compliance.

The thesis concludes by suggesting proposals for policy guidelines on enforcement of music copyright in sub Saharan Africa.

ACKNOWLEDGEMENTS

I would like to acknowledge Prof. J.A.L Sterling and Dr. Graham Dutfield who helped me conceptualise and lay the background for the thesis, as well as Dr. U. Suthersanen, Dr. Bernard Sihanya and Sybille Schalter gave me constant support and guidance while I was carrying out my research and writing my thesis. My fellow doctoral associates, Rajesh, Loise, Niki, and Dr. Mahop who gave me support especially through the challenges and Malcolm Langley as well as Jonathan Claydon of Queen Mary.

Special thanks to Prof. Janet Dine and CCLS for granting me the Herchel Smith Scholarship during my third year as well as the Max Planck Institute for granting me a fellowship during my research. Last but not least, to my family, Selina, Helen and Maryline and friends for their constant support and encouragement.

TABLE OF CONTENTS

ABSTRACT	iii
DECLARATION	v
ACKNOWLEDGEMENTS	vi
TABLE OF CONTENTS	vii
LIST OF COPYRIGHT STATUTES	x
LIST OF INTERNATIONAL INSTRUMENTS	xi
REGIONAL INSTRUMENTS	xii
LIST OF CASES	xiii
CHAPTER 1	1
1.1. Statement of the Problem	1
1.2. Scope and Objectives	5
1.3. Hypotheses	6
1.4. Research Aims	6
1.5. Methodology	7
1.5.1. Sources and Limitations	9
1.5.2. Data Collection	12
1.6. Thesis Outline	13
CHAPTER 2. THE MUSIC INDUSTRY: AN ANALYTICAL STUDY OF THE HISTORY AND DEVELOPMENT IN SUB SAHARAN AFRICA	16
2.0 Introduction	16
2.1. An Analysis of the Historical Framework of Music in Sub Saharan Africa	19
2.1.2. An Analytical Study of Music in Sub Saharan Africa from 1880 to 1950	22
2.1.3. An Assessment of the Development of Music from 1957 to 1980	26
2.1.4. An Examination of the Impact of Technology on the Music Industry (1980 to Present)	34
2.2. An Overview of Key Stakeholders in the Music Industry	40
2.2.1. Composers and authors	42
2.2.2. Performers	42
2.2.3. Recording Studios	43
2.2.4. Record Companies and Independent Producers	44
2.2.5. Agents, Managers and Promoters	46
2.2.6. Music Publishers	46
2.2.7. Broadcasters and users	47
2.2.8. Retailers and Distributors	50
2.2.9. Copyright Institutions	51
2.3. An Assessment of the Music Industry in Sub Saharan Africa	53
2.4. Challenges to the Music Industry	58
2.4.1. Ignorance and Lack of Information	59
2.4.2. Availability of Funds and Resources	60
2.4.3. Government Policy	61
2.4.4. Ineffective Administrative Structures	63
2.5. An Assessment of Unauthorised Commercial Use of Music in Sub Saharan Africa	65
2.5.1. The Notion of Piracy from an Industry Perspective	65
2.5.2. The Internet	68
2.5.3. Causes of Unauthorised Commercial Use	70
2.5.4. Cost to Industry	76
2.6. Summary and Conclusion	81
CHAPTER 3. A CRITICAL ANALYSIS OF MUSIC COPYRIGHT IN SUB SAHARAN AFRICA	84
3.0 Introduction	84
3.1. Rationale for Copyright Protection	85
3.1.1. Economic Theory	87
3.1.2. Natural Rights Theory	89
3.1.3. Related Rights or Neighbouring Rights	92
3.2. International Protection of Copyright and Related Rights	93
3.2.1. The Berne Convention	94
3.2.2. Rome Convention and the Phonograms Convention	95
3.2.3. The Trade Related Aspects of Intellectual Property Rights (TRIPS) Agreement	96
3.2.4. The WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty	97

3.3. A Critique of the History and Development of Copyright Law in Sub Saharan Africa	99
3.3.1. Protection of Copyright prior to 1870	99
3.3.2. The Colonial Era	101
3.3.3. Post Independence Copyright; 1957 –1995	105
3.3.4. An Analysis of the Current Copyright Law in Sub-Saharan Africa	111
3.3.5. Copyright infringement and the music industry	117
3.4 Summary and Conclusion.....	127
CHAPTER 4. EFFECTIVE ENFORCEMENT OF MUSIC COPYRIGHT IN SUB SAHARAN AFRICA: A THEORETICAL PERSPECTIVE.....	131
4.0 Introduction	131
4.1 Concept of Enforcement in Copyright.....	131
4.1.1 What is enforcement?	131
4.1.2. Why Have Copyright Enforcement?	133
4.2. A Critical Examination of the Core Normative and Institutional Issues in copyright enforcement in the Music Industry.....	137
4.2.1 Legal Framework	138
4.2.2 Institutional Structures	145
4.2.3. Societal Perceptions and Enforcement of Copyright	149
4.2.4. The Impact of Technology on Enforcement of Copyright.	156
4.2.5. Prevailing Political and Economic Conditions	161
4.3 Laws and Institutions as the Basic Enforcement Regime on Copyright in the Music Industry	166
4.3.1. Conceptualising the Legal Regime.....	167
4.3.2. Civil Remedies and Criminal Sanctions.....	183
4.4. Conceptualising the Institutional Framework	189
4.4.1. Public and Private Enforcement of Copyright.....	189
4.4.2. Public and Private Partnerships	195
4.5. Suggested Framework for Effective Enforcement of Copyright.....	197
4.6. Conclusion.....	200
CHAPTER 5. A CRITICAL ANALYSIS OF NON JUDICIAL ENFORCEMENT MEASURES IN SUB SAHARAN AFRICA	202
5.0. Introduction	202
5.1. An Examination of Administration of Music Copyright in Sub Saharan Africa: The Copyright Offices	204
5.1.1. The Supporting Role of Copyright Inspectors.....	214
5.2. The Supporting Role of the Police	220
5.3 Evaluating the Viability of Technical Measures: The Anti Piracy Security Device	225
5.4. Underpinning the Enforcement Infrastructure: Use of Border Measures	235
5.5. Role of Trading Standards Offices	243
5.6. A Critical Analysis of Industry Based Organisations in Enforcement of Music Copyright in Sub Saharan Africa.....	246
5.6.1. Collective Management Organisations (CMOs)	246
5.6.2. Other Copyright Industry Organisations	252
5.7. Public and Private Sector Collaboration in Music Copyright Enforcement.....	256
5.8 Summary and Conclusion.....	258
CHAPTER 6 ENFORCEMENT OF MUSIC COPYRIGHT; THE ROLE OF COURTS.....	261
6.0. Introduction	261
6.1. An Analysis of the Judicial System in Sub Saharan Africa	263
6.2. An Examination of the Role of Injunctions in Enforcement of Copyright.....	266
6.3. A Critique of Anton Piller Orders in Enforcement of Copyright in sub Saharan Africa	270
6.4. A Critical Examination of Damages, Account for Profits and Reasonable Royalties	276
6.5. The Effect of Court Orders: Delivery Up and Destruction	280
6.6. Criminal Sanctions in sub Saharan Africa.....	281
6.7. Challenges to Judicial Enforcement on Copyright in the Music Industry	290
6.8. Conclusion.....	298
CHAPTER 7. TOWARDS AN OPTIMAL LEVEL OF MUSIC COPYRIGHT ENFORCEMENT IN SUB SAHARAN AFRICA	300
7.1. Summary	300
7.2 Conclusion	303
Appendix 1. Enforcement Policy	305

Appendix 2. Policy Guidelines..... 307

Appendix 3. Legal and Administrative Structures..... 310

Appendix 4. Interview transcripts 311

BIBLIOGRAPHY 324

ARTICLES..... 324

BOOKS 328

PAPERS 332

OFFICIAL DOCUMENTS AND INDUSTRY REPORTS 334

NEWSPAPER ARTICLES 336

THESIS AND DISSERTATIONS 337

LIST OF COPYRIGHT STATUTES

Copyright and Neighbouring Rights Act of 2000 as revised in 2006, (Botswana).

Copyright Act of 1985, (Ghana).

Copyright Act No. 690 of 2005, (Ghana).

Copyright Act No. 12 of 2001, (Kenya).

Copyright Regulations, 2004, (Kenya).

Copyright Act of 1989, (Malawi).

Copyright Statute Ordinance, (No. 77-46 CMLN) Concerning Literary and Artistic Property 1977, (Mali).

Copyright Act of 1989, (as Amended) Nigeria.

Copyright (Optical Discs Plants) Regulations, 2006 (Nigeria).

Copyright Act, of 1973, (Senegal).

The Copyright Act No. 98 of 1978, (SAPL4) (South Africa).

Counterfeit Goods Act 37 of 1997, (South Africa).

Copyright Amendment Act No. 9 of 2002, (South Africa).

Copyright Act of 1964, (Uganda).

Copyright Act of 2006, (Uganda).

LIST OF INTERNATIONAL INSTRUMENTS

Berne Convention for the Protection of Literary and Artistic Works, 1883

(Paris Text, 1971).

Universal Declaration of Human Rights, 1948. UN Doc A/180.

Universal Copyright Convention and Protocols, 1952.

Rome Convention for the Protection of Performers, Producers of Phonograms and
Broadcasting Organisations, 1961.

Trade Related Aspects of Intellectual Property Rights (TRIPS) Agreement, 1994.

WIPO Copyright Treaty, 1996.

WIPO Performances and Phonograms Treaty, 1996.

REGIONAL INSTRUMENTS

Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (Text with EEA relevance).

The East African Community Customs Management Regulations of 2006.

1991), 1992 Copr.L. Dec P26, 878, 22U.S.PQ "d 1556, 1991 US Dist.Lexis 18276.

Hadley v. Kemp (1999) EMLR 589.

Hawkes & Son London Ltd v. Paramount Film Service Ltd (1934) Ch. 593.

Hubbard v. Vosper [1972] QBD 84.

Jiwani v. Going Out Magazine & another (2002) KLR 856.

Klep Valves (Pty) Ltd v. Saunders Valve Co. Ltd (1987) (2) SA 1 (A).

Ladbroke Ltd v. William Hill Ltd (1964) 1 AER 465 (HL).

Ludlow Music v. Williams (No 2) [2002] EWHC.

Macmillan Co v. Cooper (1923) 93 L.j.pc.113, 40 T.L.R 186.

Matthew Peevers v. Leo Slingerland & Media Productions Ltd HCC 2112 of 1996.

Microsoft Corporation v. Microskills Limited; Civil Case Number 323 of 1999,
(Unreported.)

Music v. Williams (No 2) (2002) EWHC, (2002) EMLR.

Musical Copyright Society Nigeria Limited v. Details Nigeria Ltd Suit No. FHC/L/CS/434/95.

Musical Copyright Society of Nigeria Ltd v. Ade okin Records Suit No. FHC/L/CS/216/96.

Musical Copyright Society Ltd v. Cash 'N' Carry Nigeria Ltd (1992) FHCLR 275.

Naidoo & Another v. Metropolis Transactive, Case No. A 828/2000 in the TPD
(Unreported).

Nevin Jiwani t/a Go Places Publications & another v. Yellow Pages Publishing & Marketing Ltd (2006) eKLR.

Nigerian Copyright Council v. Musical Copyright Society of Nigeria, Suit No. FHCL/L/43C/99.

Northern Office Micro Computers (Pty) v. Rosenstein (1981) (4) SA 123 C.

Paul Odalo Abuor v. Colour Print Ltd & Text Book Centre.

Performing Right Society Ltd v. Berman (1975) F.S.R 400 (High Court of Rhodesia).

Phonographic Performance Ltd v. Reader (2005) E.M.L.R 26, (2005) F.S.R 42,

LIST OF CASES

- Accesso v. Allforms (Pty) Ltd & Another* (Case No. II) 677 JOC (T).
- Albert Kiarie v. John Nyaga & Others* HCC 2072 of 2000.
- Alternative Media Ltd v. Safaricom Limited* [2005] eKLR.
- Akuma Industries Ltd v. Ayman Enterprises Ltd* [1999] 13 N.W.L.R.
- American Cyanamid Co. v. Ethicon Ltd* [1975] AC 396.
- American Cyanamid Co. v Ethicon Ltd.* (1979) F.S.R.
- Anton Piller K.G. v. Manufacturing Processes Ltd* (1976) Ch. 55.
- Austin v. Columbia* [1917-1923] Mac. C.C.398.
- Australian Coarse Grain Pool Pty Ltd v. Barley Marketing Board of Queensland*
(1983) 57 ALJR.
- Biotech Laboratories (Pty) Ltd v. Beecham Group PLC & another* 2002 (4)
SA 249 (SCA).
- BMG Music v. Gonzalez* 430 F.3d 888 (7th Cir. 2005).
- Bress Designs (Pty) Ltd v. GY Lounge Suite Manufacturers (Pty) Ltd & Another*
[1991] SA 455 (W).
- Campbell v. Acuff-Rose Music*, 510 U.S 569 (1994).
- CCP Records Co (Pty) Ltd –v. Avalon Record Centre* (1989) 1 SA 445.
- Dickens v. Eastern Province Herald* (1861) 4 Searle 33.
- Eldred v. Ashcroft*, 537 US 186(2003) 239 F 3d 372.
- EMI Records Ltd and Others v. The CD Specialists Ltd* (1992) FSR 70.
- Frank Music Corp v. Metro Goldwyn Mayer Inc* 772 F. 2d 505 (9th Cir. 1985).
- Federal Republic of Nigeria v. Asika Unreported Case No.* FHC/K/2CR/92.
- Galago Publishers (Pty) Ltd & Another v. Erasmus* (1989) (1) SA 276 (A).
- Grand Upright Music, Ltd v. Warner Brothers Records, Inc* 780 F.Supp. 182 (S.D.N.Y

1991), 1992 Copr.L. Dec P26, 878, 22U.S.PQ “d 1556, 1991 US Dist.Lexis 18276.

Hadley v. Kemp (1999) EMLR 589.

Hawkes & Son London Ltd v. Paramount Film Service Ltd (1934) Ch. 593.

Hubbard v. Vosper [1972] QBD 84.

Jiwani v. Going Out Magazine & another (2002) KLR 856.

Klep Valves (Pty) Ltd v. Saunders Valve Co. Ltd (1987) (2) SA 1 (A).

Ladbroke Ltd v. William Hill Ltd (1964) 1 AER 465 (HL).

Ludlow Music v. Williams (No 2) [2002] EWHC.

Macmillan Co v. Cooper (1923) 93 L.j.pc.113, 40 T.L.R 186.

Matthew Peevers v. Leo Slingerland & Media Productions Ltd HCC 2112 of 1996.

Microsoft Corporation v. Microskills Limited; Civil Case Number 323 of 1999,
(Unreported.)

Music v. Williams (No 2) (2002) EWHC, (2002) EMLR.

Musical Copyright Society Nigeria Limited v. Details Nigeria Ltd Suit No. FHC/L/CS/434/95.

Musical Copyright Society of Nigeria Ltd v. Ade okin Records Suit No. FHC/L/CS/216/96.

Musical Copyright Society Ltd v. Cash 'N' Carry Nigeria Ltd (1992) FHCLR 275.

Naidoo & Another v. Metropolis Transactive, Case No. A 828/2000 in the TPD
(Unreported).

*Nevin Jiwani t/a Go Places Publications & another v. Yellow Pages Publishing &
Marketing Ltd* (2006) eKLR.

Nigerian Copyright Council v. Musical Copyright Society of Nigeria, Suit No. FHCL/L/43C/99.

Northern Office Micro Computers (Pty) v. Rosenstein (1981) (4) SA 123 C.

Paul Odalo Abuor v. Colour Print Ltd & Text Book Centre.

Performing Right Society Ltd v. Berman (1975) F.S.R 400 (High Court of Rhodesia).

Phonographic Performance Ltd v. Reader (2005) E.M.L.R 26, (2005) F.S.R 42,

(2005) EWHC 416.

Plateau Publishing Co. Ltd v Adophy. (1986) 4 N.W.L.R (PT34) 295.

Performer Rights Society. v. Butcher (1975) F.S.R. 405.

Priority Records (Pty) Ltd v. Ban-Nab TV (1988) (2) SA 281 (D) 292-294.

R v. Angelina Mbai CF2431 of 2000 (Unreported).

R v. Christine Mwangi CF 2436/2000 (Unreported).

R v. Winnie Wanjiru Karume CF 3438/2000 (Unreported).

R v. Lucy Wanjiru Murithi CF 2435/2000 (Unreported).

Redwood Music v. Chapell (1982) R.P.C 109.

RJC-Macdonald Inc v. Canada (AG) I. (1994) 1 SCR 311.

SA Music Rights Organisation Co (Pty) Ltd v. Trust Butchers (1978) (1) SA 1052 (E) 1057-1058.

SACEM v. AXL. (2005) Trib. Gde. Inst (Pantoise). (Unreported).

Sawkins v. Hyperoin Records Ltd (2004) EWHC 1530; (2004) All E.R. (Ch D).

Series 5 Software Ltd v. Philip Clarke (1996) FSR 273.

Shoba v. Officer Commanding Temporary Police Camps Wagndrift Dam and Another 1995 (4) SA 1 (AD).

Solignun Ltd v. Rogers Adetola (1992) FHCLR 157.

Sutherland Publishing Co. Ltd v. Caxton Publishing Co. Ltd (1936) 1 All ER 177.

Systems Africa Ltd v. Kalamazoo (1974) EA 2.

Universal City Studios Inc v. Network Video (Pty) Ltd (1986) (2), SA 734 (A).

Universal City Studios Inc v. Network Video (Pty) Ltd (1986) (2), SA 734 (A).

University of London Press Ltd v. Tutorial Press Ltd. [1916] 2 Ch. 601 at 608.

Vagar t/a Rajshree Release v. Transavalon (Pty) Ltd t/a Avalon Cinema (1977) (3) SA 766 (W).

Video Rent (Pty) Ltd & another v. Flamingo Film Hire (198)1 (3) SA 42 (c).

Warner Bros Inc v. Melotronics, Cases No. 4607-15/86.

Waylite Diaries CC v. First National Bank Ltd (1995) (1) SA 645 (A) JOC.

Wilson Irungu Wambugu v. AI Records (Kenya) Ltd HCC 2230 of 2000.

Wood v. Boosey (1868) L.R. 3 Q.B 226.

Yemitan v. Daily Times (Nig) Ltd [1980] F.H.C.L.R 186.

LIST OF ABBREVIATIONS AND ACRONYMS

ARIPO	African Regional Intellectual Property Organisation
ASN	Association Sénégalaise de Normalisation
APSD	Anti Piracy Security Device
AMS	Association of Senegalese Musicians
BSDA	<i>Bureau sénégalais dud riot d'auteur</i>
CD Rom	Compact Disc Read Only Memory
CIGS	Cultural Industries Growth Strategy
CIPRO	Companies and Intellectual Property Registration Office
COSGA	Collecting Society of Ghana
COSOMA	Copyright Society of Malawi
DACAST	Department of Arts, Culture, Science and Technology
DRC	Democratic Republic of Congo
EU	European Union
IFPI	International Federation of the Phonographic Industry
IIPA	International Intellectual Property Alliance
KAMP	Kenya Association of Music Producers
KEBS	Kenya Bureau of Standards
KEMAA	Kenya Music Anti- Piracy Association
MCSK	Music Copyright Society of Kenya
MCSN	Music Copyright Society of Nigeria
MUSIGA	Musicians Union of Ghana
OECD	Organisation for Economic Co- operation and Development
RISA	Recording Industry of South Africa
SABS	South African Bureau of Standards
SADC	Southern African Development Corporation
SAFACT	South African Federation against Copyright Theft
SAPS	South African Police Service
SARS	South African Revenue Service
SON	Standards Organisation of Nigeria
SAMRO	South African Music Rights Organisation
TRIPS	Trade Related Aspects of Intellectual Property Rights
UDHR	Universal Declaration of Human Rights
UNCTAD	United Nations Conference on Trade and Development
USPTO	United States Patent and Trademarks Office
WCT	WIPO Copyright Treaty
WIPO	World Intellectual Property Organisation
WPPT	WIPO Performances and Phonograms Treaty
WTO	World Trade Organisation
ZIMRA	Zimbabwe Music Rights Association

CHAPTER 1

“A legal intellectual property system is functioning efficiently only if it is properly and effectively enforced and administered. Given the fact that the legal protection is sufficient, the increasing presence of counterfeiting and piracy can only be explained by insufficient enforcement.”¹

1.1. Statement of the Problem

Mere passage of updated and concise legislation is no guarantee that law is being enforced and a law that cannot be enforced is of no use to those it seeks to protect.² Lack of effective enforcement of existing laws is one of the main problems experienced by the music industry in sub Saharan Africa.³

Copyright laws in sub Saharan Africa were introduced at the advent of the colonial era. Their main interest was to protect the interests of settlers which did not take into account existing cultural perspectives. The result was the creation of property rights for music and other artistic and literary works which were previously owned communally.⁴

After independence, several countries, especially those that were formerly under British rule like Kenya and Nigeria, retained most provisions of pre-colonial laws

¹Thomas Bodström, Minister for Justice, Sweden. Speech delivered at the Conference on Counterfeiting and Piracy, Stockholm, April 22-24, 2001. As quoted by Robin Fry, (2002). Copyright Infringement and Collective Enforcement. *E.I.P.R* 24{11} 516 –524.

² Betty Mould Iddrisu, (2001) A Developing Country's Perspective: Introduction to Intellectual Property Rights, available at: <http://usinfo.state.gov/products/pubs/intelprp/perspect.htm> (Last Accessed July 2005).

³ This will be discussed in greater detail in paragraph 4.2.

⁴ Some communities such as the Hausa of Nigeria had a written tradition and most of their creative works such as poetry were recorded. The Hausa has a system of ownership akin to the author's right system. For further reading, see R. Finnegan (1970). *Oral Literature in Africa*. Nairobi: Oxford University Press p.106.

albeit under different titles.⁵ Francophone countries like Senegal passed their copyright laws in the 1970s. Most post independence governments did not attach much importance to copyright.⁶

Interestingly, although the laws provided for infringement and remedies, the countries did not have proper administrative and enforcement structures until the 1980s which in some jurisdictions has yet to be achieved.⁷ They did not have clear policies on copyright and enforcement.⁸ Existing institutional structures were reminiscent of the colonial era. This was exacerbated by apparent lack of interest in knowledge industries by various governments⁹. It is notable that although these countries are members of the World Trade Organisation (WTO), implementation of copyright law is wanting. Weak administrative structures and enforcement mechanisms are evidence of the above. The number of cases handled by police, customs and courts is low in comparison to increased acts of unauthorised commercial use.¹⁰

⁵ What were previously ordinances became Acts. In Kenya and Uganda, the 1966 and 1964 Copyright Acts were enacted and remained law until recently when new laws were enacted repealing them. The history is also discussed in greater detail in paragraph 3.3.

⁶ From a survey of copyright law, in Kenya, and Senegal, it is notable that there was little that was done by the governments to enforce copyright and related rights. For instance in Kenya, from 1966 to 2001, the copyright section within the Department of the Registrar General only had one officer assigned to it. The Governments in the countries under research did not have Intellectual Property policies.

⁷ The low incidence of piracy could also have contributed to the same, as it was difficult to duplicate sound recordings unless one had the expensive pressing plants that were used for the sound recordings. These were in the hands of the few authorised companies so enforcement was not an issue then. See paragraph 2.5.

⁸ Kenya is currently working on the Intellectual Property Policy while Nigeria has a Cultural Policy that covers some aspects of music. South Africa and Senegal have yet to develop Intellectual Property Policies.

⁹ Keith Maskus. (2000) Intellectual Property Rights and Economic Development. *Case Western Journal of International Law*, Vol.32 pp. 471-493. The legal development of copyright law in sub Saharan Africa will be discussed in paragraph 3.3.

¹⁰ During fieldwork, the author was only able to get a few decided cases on copyright and related rights from the four countries. One of the reasons given by the court registries was that there were very few copyright cases that were brought to court and some of the ones that made it to court were unreported. The courts in Kenya are in the process of digitising their registry, which will make it easier to access case law from the courts. South Africa is also undertaking the same process.

Countries like Nigeria have enforcement structures in place.¹¹ South Africa and Kenya enacted new laws in 1997 and 2001, respectively to create new structures as well as strengthen existing institutions. Penalties for copyright infringement were enhanced.¹²

Part of the problem may be traced to institutions both within the public and private sectors that are mandated to enforce laws. These institutions have not been very keen on copyright enforcement. Inefficiency in administration is blamed on various factors such as uninformed police, customs officers, and the standards organisations.¹³ The judicial system is slow and tends to concentrate on “more serious issues.” Little attention is given to the few cases determined by courts. Damages awarded by courts are nominal in comparison to damage caused by unauthorised commercial use and do not adequately compensate the rights holders. Fines and custodial sentences lack the deterrent and punitive effect of criminal sanctions. In South Africa for instance, no fines of over US\$ 1 000 have been granted by courts even though the maximum fine prescribed by law is about US\$ 1 500 per infringing act. There are few reported cases on infringement especially those related to music.¹⁴

¹¹ Nigeria enacted the 1988 Copyright Act, which made provisions for the Nigerian Copyright Commission (NCC) and enhanced the penalties while Malawi also had a new law passed in 1989 making provisions for the general administration of Copyright through the Copyright Society of Malawi (COSOMA).

¹² In 1997, South Africa enacted the Counterfeit Goods Act to handle matters of piracy and anti counterfeiting while Kenya enacted the Copyright Act of 2001, which among other things created the Kenya Copyright Board, and enhanced the penalties. The enactment of new laws and provision for the relevant institutional structures did not reduce the levels of piracy and as the industry reports indicate, the average levels of piracy have risen from less than 30% in the 1997 to over 50% in 2004.

¹³ In Kenya for instance, copyright owners believe that it is the duty of the Government agencies to enforce the law and not the rights holders. See Ben Sihanya. (2003) “Constructing Copyright and Literary Creativity in Kenya.” Unpublished Doctoral Thesis, Stanford University chapter 2.

¹⁴ The situation is even worse in Malawi where the average penalty granted by the courts is less than US\$ 100. This is attributable to various factors that will be discussed in greater detail in paragraph 4.2.

There is a discrepancy between the statutory provisions on copyright and what happens in practice.¹⁵ There are instances where law is present but not enforced. Kenya is a good example. Although the Honourable Attorney General appointed the Kenya Copyright Board in July 2003, it is not fully operational. This has led to parts of the law not being enforced such as provisions on authentication of copyright protected works. The Act provides for administrative as well as enforcement structures that have not been put in place or are not fully operational.¹⁶

This research examines copyright law enforcement in sub Saharan Africa especially the role of enforcement agencies such as copyright offices, standards organisations police, customs and judicial authorities. The author examines different aspects of enforcement such as investigation of infringement, prevention of unauthorised commercial use, prosecution of cases, and civil litigation in copyright cases. The continent has yet to achieve the optimal level of enforcement.¹⁷

In Chapter 4, the author analyses the concept of enforcement of copyright in relation to the music industry with the aim of establishing the optimal level of ensuring that copyright is enforced.

¹⁵ For Instance, Article 53 of the Copyright Act of Senegal requires radio stations to pay royalties to collective management societies for the music that they play. For a long time this was not enforced and the music was played without authors receiving any royalties for their music played by the stations. The head of the collecting society got a court order to shut down one radio station and within two weeks, the other radio stations were paying royalties to the collective management society. Interview with Frank J. Penna (Telephone interview, July 26 2005). Mr. Penna is a World Bank Consultant and Director at the Institute of Policy Studies. He has been involved in the World Bank Music Project since 2001 and has done several studies on the music industry in Africa.

¹⁶ See Paragraph 4.2 and 5.1.

¹⁷ The decline of the music industry in Ghana for example, was attributed to various factors such as the prevailing political climate, economic challenges and the introduction of new technologies. But the main issue was enforcement. In 1992, the Government introduced the "banderol" system to help in enforcement of copyright and they also stepped up enforcement efforts. By 1996 unauthorised commercial use had reduced to 15% for local works and 25% for foreign works. The case illustrates the need to have effective enforcement mechanisms to complement the law as Ghana already had a comprehensive copyright law in place. Betty Mould, Iddrisu, *supra*, footnote 2.

The main justification of this research is that there have been no studies investigating the role of enforcement in effective protection of copyright and related rights especially in the music industry in sub Saharan Africa.

1.2. Scope and Objectives

It is necessary to examine various institutional structures, how they are set up, their functions, challenges and achievements in enforcement of copyright in the music industry. Primary considerations include examining the nature and existence of relevant laws. Most laws in sub Saharan Africa were adopted from either English or French laws. They continue to be influenced by international laws.¹⁸

How authors, users and society as a whole respond to these laws affects enforcement of copyright law. Although the State makes the rules, there are norms and informal modes of behaviour that facilitate enforcement.¹⁹ The second consideration is the nature of public and private institutions that are mandated to enforce existing legal norms. The third consideration relates to factors that have a bearing on the effectiveness of enforcement regimes such as political circumstances, cultural perceptions as well as economic and technological issues.

One has to examine the political, social, economic and technological factors to understand the dynamics within the music industry in sub Saharan Africa.

¹⁸ See paragraph 3.3.

¹⁹ See Paragraph 4.2.

1.3. Hypotheses

The enactment of laws without corresponding administrative and enforcement frameworks reduces the effectiveness of the law. I seek to evaluate this statement using three related lines of enquiry:

- (a) Why is enforcement of copyright a problem in most of sub Saharan Africa?
- (b) Why has the existing legal regime failed to ensure effective enforcement of copyright in sub Saharan Africa?
- (c) What constitutes effective enforcement of music copyright?

In exploring these issues, it is important to find out how existing institutions affect enforcement of copyright in the music industry. It is also important to examine factors that influence enforcement of copyright in the music industry as well as determine effective levels of enforcement.

1.4. Research Aims

This research has four interrelated aims:

- (a) To analyse existing institutional framework of enforcement in the context of economic, political as well as social dynamics within the music industry in sub Saharan Africa.
- (b) To discuss the concept of effective enforcement in relation to copyright in the music industry.
- (c) To examine factors that influence enforcement of copyright and related rights within the continent.

- (d) To explore the possibility of coming up with proposals for effective copyright enforcement.

1.5. Methodology

There is a dearth of materials on copyright enforcement in Africa. The thesis is the first systematic study of the sub Saharan copyright enforcement system.

The choice of the music industry was deliberate as this is one area where enforcement has been a major issue in sub Saharan Africa. Enforcement is the key concept in this thesis. A critical analysis of existing enforcement mechanisms is important to determine whether or not they serve the purpose for which they were formed. If not, what changes are required.²⁰ A critical examination of existing interest groups and institutional framework will aid in understanding the dynamics of law enforcement within the music industry.²¹ This will include examination of existing legal regimes as well as corresponding administrative and enforcement structures.

The study covered four sub Saharan countries namely Kenya, Nigeria, Senegal and South Africa.²² These have been selected based on the following considerations.

²⁰ According to Peter G. Klein, (1999) *New Institutional Economics* (Dept of Economics University of Georgia) aims to explain what institutions are, how they arise, what purpose they serve how they change and how if at all they should be reformed. However, the author shall only examine the public and private institutions such as the courts, the copyright offices, police and other enforcement agencies as well as the industry based institutions.

²¹ See Thrainn Eggerston, (1990). *Economic Behaviour and Institutions*. Cambridge: Cambridge University Press. p.70.

²² Kenya, Ghana, Nigeria and South Africa have inherited the copyright system. South Africa's legal system is a hybrid. The copyright law is based on common law system but the procedures and main legal system in South Africa is based on the Roman Dutch law. For further reading on the history of copyright law in South Africa see, Owen. H. Dean. (1987). *Handbook on South African Copyright Law*. Johannesburg: Juta and Co Ltd Wheton. P.1-1.

First, the continent has both the copyright system and the authors' system as will be discussed in greater detail in paragraph 3.1.²³ It is desirable to examine both systems. South Africa provides an interesting case study; although its copyright law is derived from the common law system, its procedures are drawn from the civil law system.²⁴

Secondly, the nature and level of copyright protection granted by each country was considered. Kenya, Nigeria, and South Africa recently amended their laws to conform to the provisions of the TRIPS Agreement. Senegal has yet to amend its law and is currently relying on laws that were passed in the 1970s.²⁵ In Kenya and Nigeria, the industry is not centralised. The industry in Senegal is vibrant due to various efforts by the Copyright Office, major artists as well as producers.²⁶ The music industry in all four countries is at various stages of development.

Thirdly, is the institutional framework on enforcement of copyright found in the four jurisdictions within the public as well as the private sector. A critical analysis of enforcement based on a political, social and economic analysis as well as the technological factors will help in testing the hypotheses. The above countries have been engaged in various enforcement activities but have not been able to reduce the unauthorised commercial use of music.

²³ Being former colonies, African countries inherited the legal systems that had been transferred from Europe, mainly from France and England. There are other countries that were colonised by other European countries such as Portugal, Spain and Belgium but the majority were either former British or French Colonies.

²⁴ See article by Louis Harms. (2004) The Role of the Judiciary in Enforcement of Intellectual Property Rights; Intellectual Property Litigation Under Common Law System with Special Emphasis on the Experience in South Africa. *E.I.P.R.* 26 (11) 483-492.

²⁵ See paragraph 3.3.

²⁶ Interview with Mr. Aziz Dieng of Senegal (July 2005) and Sybille Schlater Max Planck Institute (August 2005).

All four countries have modern copyright legislation and are members of the WTO. These countries may not be wholly representative of Africa but they will provide a basis for an analytical study and groundwork for future studies on enforcement within the continent.

1.5.1. Sources and Limitations

Data on the music industry is scarce and there are very few industry-based reports such as the annual and piracy reports by IFPI. These reports are limited to certain countries that are seen to have potential markets and are thus not a true representation of the entire music industry.²⁷ There is no organised database on creation, use and sale of music in Africa thus one has to rely on estimates from the industry players. Statistics with regard to the sale of music are also scarce and data from collective management societies are based on membership.

Research and statistics on the music industry are limited apart from the few studies carried out by the World Bank in Senegal and in Kenya. The World Intellectual Property Organisation (WIPO) recently carried out an Intellectual Property Audit that included an audit of the copyright industries. Few countries have carried out a comprehensive study on the music industry. In 1998, the then Department of Culture commissioned a study on the music industry in South Africa. The World Bank carried out a value chain analysis of the music industry in Kenya.²⁸ UNCTAD also carried out a study on the music industry and development in Senegal in 2004.

²⁷ The data save for South Africa and Malawi is based on estimates in the music industry.

²⁸ A value chain analysis, report is yet to be released officially.

Mr. O'dyke Nzewi carried out some research on the music industry in Nigeria on behalf of the International Music Council.²⁹ However, no comprehensive study has been done on enforcement of music copyright in Africa and literature is scarce. Apart from the above studies, official documents along with annual reports from collecting societies and other industry organisations, the available literature is limited.

It was not possible for the author to get case reports from the registries visited in Kenya and South Africa. In Kenya, the courts have only recently embarked on computerisation of their registries and even then obtaining the cases was almost impossible due to the volume of their work. Case law in this area is not well developed and documented. There were cases available in relation to infringement of literary works such as books and computer programmes. One of the reasons given at the registries was that there were very few cases determined by courts in the area of music.

Another limitation is language; a comprehensive study requires knowledge of French in order to access data and literature from the French speaking countries such as Senegal and Mali to offer a good comparative study. The author managed to get information from Senegal through communication with the *Bureau sénégalais du droit d'auteur* (BSDA) via email but got no response from the Office in Mali.

The author relied on three main sources of material namely:

²⁹ Nzewi O'dyke. (2003) "The Effects of Globalisation in the Nigerian Music Scene;" For the ManyMusics Project of the International Music Council, October 2003 available at www.mca.org.au/pdf/mmresfinal.pdf (Last accessed May 2006).

1. Laws and judicial decisions from the four countries under study as well as other jurisdictions in sub Saharan Africa to illustrate some of the issues.³⁰ Case law in Africa in this area is not well developed and there are various cases that go unreported.
2. Legal literature and Reports. These include consultative reports, legislative documents, government white papers, treatises as recent papers on the subject and other legal materials available. The reports are mainly from the music industry and governments.
3. Fieldwork. It involved informal consultations and interviews with the relevant government officials, producers and performers, composers and authors as well as other interest groups within the industry.³¹

Primary data from the countries under study was used to complement the existing literature on enforcement. Some legislative documents and policy documents were obtained online while others were sourced from government departments.

Statistical Hypothesis

Countries with more effective enforcement mechanisms are likely to have more creative works and a vibrant music industry. Nigeria for instance has a good legal regime on copyright but it is currently estimated that over 90% of the music sold is illegal. Enforcement is still a major issue in Nigeria.

³⁰ In the common law jurisdictions, courts still refer to precedents decided by courts in the United Kingdom. The research will also draw from these decisions as they are used to determine copyright cases.

³¹ These informal consultations were carried over the duration of the research. Some of the interview subjects were not willing to be quoted in the research. It is however notable that these informal consultations provided information that was otherwise not available in the secondary data.

According to a study on the music industry in South Africa, the industry employs over 12 000 people and realises a gross turnover of about ZAR 900 million (US\$138 million).³² The total sales in 2003 were 17 million copies. However, this is less than 60% of the actual sales as the rest is unauthorised. Laws exist but enforcement is still an issue. Kenya also has updated laws but weak enforcement mechanisms. The annual sales are estimated at 12 million copies. This is only 10% of the music sold. The legitimate industry is under serious threat.³³

The judicial systems in Kenya, Nigeria, Senegal and South Africa, as will be discussed in Chapter 6, are slow and treat copyright infringement cases especially unauthorised commercial use as minor offences. For instance out of the thirteen copyright infringement cases that were determined by Kenyan courts between 2000 and March 2004, twelve were dismissed on technical grounds. In the one case that was prosecuted, the court found the defendant guilty but acquitted him on grounds that he had acted in good faith.³⁴

1.5.2. Data Collection

The author relied on both primary and secondary material.

- (a) Interviews and informal consultations were the basic form of collecting primary data. The target group included: authors, composers, producers as well as publishers in the music industry, the copyright office, the customs and

³² "Cultural Industries Growth Strategy (CIGS) of South African Music Industry". Report done for the then Department of Arts, Culture, Science and Technology (DACST) 1998 available at: www.dac.gov.za/reports/music_pub_film_craft/musfin1.doc.

³³ Malawi has quite a small economy compared to the above-mentioned countries and so is their music industry. The laws in place have in the last ten years been well enforced and they managed to reduce the unauthorised commercial use of music to about 15%

³⁴ The cases were either dismissed on account of faulty charge sheets, lack of court jurisdiction to hear them (they were brought before the subordinate courts which, had no jurisdiction to hear the cases.) In others, the prosecution failed to avail the necessary witnesses and the cases were dismissed. These are all unreported cases.

police officers together with the Judiciary. The author prepared two questionnaires and sent them to each target group in the four countries via email. In the case of Kenya and South Africa, the author was able to have informal interviews with rights holders and government officials who included the secretary to the Musicians Union of South Africa, (MUSA), the former General Manager of the South African Music Rights Organisation (SAMRO), the Head of the Intellectual Property Office within the South African Department of Science and Technology. She was also able to carry out informal interviews with musicians. In Kenya, the author met with Government officials from the Kenya Copyright Board and the Kenya Revenue Authority, officials from the music industry organisations and other rights holders.

- (b) Obtaining judicial decisions in law reports was difficult and the author had to visit court registries in some instances to extract the judgement. As mentioned earlier, since the registries in Kenya and South Africa are in the process of being computerised, the author had to rely on unreported case law.
- (c) Library research provided access to academic journals, case law, books, research papers, official documents and industry reports.
- (d) Other information was gathered from existing databases, collective management societies (CMOs), enforcement agencies and the policy makers.

1.6. Thesis Outline

The thesis is divided into four main parts.

Chapter 1 provides a background to the thesis as well as outlining issues that will be discussed. Chapter 2 gives a brief overview of the music industry with its challenges especially those that are directly connected to enforcement of copyright and related rights. The chapter covers the historical development of music in Africa from the pre-colonial period to present times. It provides an insight into the music industry as well as the issues brought about by limited or lack of enforcement of copyright in the music industry. The chapter then paves the way for the third chapter that discusses the history and development of copyright law in Africa. This chapter also examines the role of international copyright law in shaping the existing copyright regime within the continent. It also examines copyright infringement in relation to unauthorised commercial use of copyright protected works.

Chapter 4 identifies core conceptual and institutional issues on enforcement. The chapter analyses the theoretical framework on enforcement including what is enforcement, rationale for enforcement and challenges. The chapter also examines the political, economic, social and technological factors that influence enforcement of copyright. The concept of what constitutes an effective copyright enforcement regime is also discussed. The chapter further analyses law and institutions as the basic enforcement structures in the music industry. This includes the legal framework, administrative structures both private and public as well as the public private partnerships. These institutions are important in implementation of copyright law. It provides a theoretical framework for practical enforcement issues that are discussed in the third part of the thesis.

The third part of the thesis involves a critical analysis of legal and institutional structures on copyright enforcement especially in relation to the music industry based on the political, social, economic as well as technological analysis. Chapter 5 discusses various enforcement efforts and loopholes therein. It covers a comparative analysis of law, public and private enforcement mechanisms, role of the government and how each country is addressing issues raised.

In the fourth and final part of the thesis, the researcher gives a summary, conclusion and recommendations. The author gives recommendations on the reconstruction of legal and institutional structures on copyright enforcement based on the four countries under study and provides proposals for policy guidelines.

CHAPTER 2. THE MUSIC INDUSTRY: AN ANALYTICAL STUDY OF THE HISTORY AND DEVELOPMENT IN SUB SAHARAN AFRICA

2.0 Introduction

The music industry in Africa is dynamic. The continent is home to artistes of renowned international fame such as Miriam Makeba and Hugh Masekela from South Africa, Fela and Femi Kuti of Nigeria, Yussour N'dour of Senegal, Osibisa from Ghana, Papa Wemba of the Democratic Republic of Congo (DRC) and Fadhili Williams of Kenya.

Music has also been used for synchronisation in films as well as advertising. A recent example is the use of one popular track by Ladysmith Black Mambazo, a leading South African group in the advertisements for *Heinz* as well as *Kodak*. The use of the song in advertisements increased sales of the track by over 750 000 units. Another example is the song "*The Lion Sleeps Tonight*" which was used in the "Lion King sound track". Originally a Zulu song, it was adapted by Solomon Linda, another artist from South Africa and became a worldwide hit in 1950.¹

In order to understand the dynamics within the music industry in sub Saharan Africa, it is important to have a brief on the continent.

¹. It has been adapted and used as a Military March in New Zealand, British Soccer World Cup jingle, as well as in various commercials and film sound tracks and is currently identified with Disney. For further reading, see "Development of Markets for the Music Industries in the SADC Region" document presented at the SADC Inter-Ministerial Conference on the place and role of Culture in SADC Regional Integration. Agenda available at <http://www.teledata.mz/sadcult/pmark.htm> (last accessed July 2006).



The African continent covers a total physical area of 30 330 000 square kilometres which is about 22% of the world's total surface area. The largest country is the Sudan while the smallest is the Seychelles.² With 54 countries, 53 of which are independent, the population is estimated at 748 million and 1000 languages.³

³ Western Sahara has yet to gain autonomy from Morocco.

Geographically, it may be divided into five major regions, Northern, West, Central, Eastern and Southern Africa. Most states in Africa are relatively young compared to Europe. Apart from Ethiopia and Liberia, all the other countries were colonised in the 19th Century by various countries namely England, France, Portugal, Spain, Belgium and Germany. They gained their political independence from the colonial regime between the 1957 and 1994. The colonial era was to leave a lasting legacy on the political, social, economic and even cultural aspects of life within the continent. The continent has a history that has been influenced by various civilisations that interacted with the continent at various points in history.⁴

Arts and culture form an important aspect of life in different communities within the continent.⁵ The music industry, like other creative industries enhances the quality of life. First, it forms an income base for those within music industries such as composers, authors and performers producers of sound recordings.⁶ Second, it is a source of entertainment as well as means of promoting dialogue within the community. It encourages harmonisation in areas where there is a social divide. Third, music sustains old identities and creates new ones. For instance, traditional music was unique to different communities and current artists are coming up with new styles and sounds. These could be a fusion of traditional sounds with contemporary music such as the *Mbalax*⁷ from West Africa or new styles such as *Kwaito* in South Africa or *Genge* in Kenya.

⁴ An example is the interaction with the Arabs along the East African Coast from Lamu in Kenya to Pemba in Mozambique, which were at one time part of the Sultanate of Oman. The interactions between the local inhabitants along the coast and the Arabs gave rise to the Swahili community, which developed its own cultural identity including a distinct genre of music.

⁵ There are several creative industries such as music, traditional arts and crafts, visual arts, films etc.

⁶ See the WIPO National Studies on the Economic Contribution of Copyright Based Industries; Creative Industries Series No. 1 of 2006.

⁷ *Mbalax* Style, literally 'rhythms and drums' available at:

Fourth, music like other cultural industries makes a distinct but inter-related contribution to economic development, social change and political cohesion as well as cultural progress.⁸

It is imperative to have suitable safeguards and mechanisms to ensure that rights holders benefit from their creative works. This requires effective enforcement of copyright within the industry.

2.1. An Analysis of the Historical Framework of Music in Sub Saharan Africa

Prior to the 19th Century, societal norms and culture governed use of creative works such as music. The 19th Century saw socio-economic, political and cultural changes. These changes influenced the music industry in sub Saharan Africa.

(a) Music in Traditional Societies

Mr. Sylverse Anami, the Director of Culture in Kenya, contends that in Africa, music has always been seen as a way of life and permeates all sectors of society. Music in various traditional African communities was used to express the individual and collective spirit of the community. It was composed and performed on all occasions.⁹ Most music was passed down from generation to generation, as no means of recording and storing music existed. Music expressed the rich cultural heritage of most communities and was used as a means of conveying messages as well as information

<http://www.artandculture.com/arts/movemnt?movementId=720>. (Last accessed May 2006). *Kwaito* is a genre of music that has developed among the youth in South Africa while *Genge* from Kenya is a form of hip-hop that has developed in the last ten years.

⁸ Amartya Sen. (2000) "What's the Use of Music? The Role of the Music Industry in Africa," Paper presented at the World Bank Workshop on the Music Industry in Africa 2000, Washington DC.

⁹ From birth to death, weddings, harvest, during games, and lullabies.

within the community. It could either be vocal, accompanied by instruments or both.¹⁰

The main instruments used were percussion, wind and string instruments as well as drums.¹¹

(b) Ownership of Music

Ownership of music in communities that relied on oral tradition was seen as emanating from the community although composers and performers were acknowledged for their creativity.¹² They were compensated for their performances. This was in the form of gifts as a sign of appreciation to the creators. Musicians, such as the *griots* in Senegal were respected and recognised as important members of the society. In such cases, particular families or clans composed music, which was inherited by successive generations through the patriarchal line.¹³ The songs, in these communities were not fixed and new songs were developed from existing melodies.¹⁴ Performers and creators were rewarded for their compositions and accorded the relevant respect. Each community had a distinctive sound and style and these were viewed as fingerprints, unique to each community.¹⁵

¹⁰ More often than not, rhythm was inseparable from dancing. This can be best illustrated from the Kiswahili word '*Ngoma*' which means either the drum or the dance event; singing, dancing and the accompanying music. This section is based on an interview on 1st July 2005 with the Mr. Sylverse Anami, Director of Culture, Department of Culture Kenya. He is also music teacher and has extensive knowledge in cultural matters especially with regard to music.

¹¹ The percussion instruments were used to enhance the rhythm while the string instruments were normally used for solo performances. The drum was universal and was used by all the communities.

¹² This recognition is akin to the author's right as envisaged under the civil law system. The community gave the creators the due recognition.

¹³ This would be more prominent in cases where music was seen to belong to the various specialists such as the healers for healing music, counsellors, and teachers among others. See J. Cathchart. (1989). *The Music of West Africa; A Period of Transition*, in F. Hanly and T. May. (1989). (eds.) *Rhythms of the World*. London: BBC Books.

¹⁴ Wedding songs are an example whereby the performer customised the song to suit a specific wedding ceremony.

¹⁵ Interview with Mr. Sylverse Anami *supra* note 10.

Music was a form of historical record especially in communities with an oral tradition. Through music, one could learn about culture and history of a given community.

(c) Value of Music

Like in the modern copyright system, the value of music was proportional to the number of people who heard the music. Fame and respect were what authors yearned for. There were certain customs and taboos that prevented abuse or misuse of music. Music that was composed for healing or prayer purposes was not used for any other purpose. Some songs could only be performed by specific sectors within the society. For instance, there were songs, which could only be performed by initiates during the rites of passage. In certain communities authors were known to come from a certain lineage and they would pass their skills through generations.¹⁶

The advent of the colonial era had an impact on the growth and development of the music industry in sub Saharan Africa. This, as will be discussed in the following paragraph, played a major role in shaping the music industry.

¹⁶ The information in this section was based on diverse interviews held with the following that have dealt with or have been dealing with music and copyright in Africa. Mr. Sylverse Anami, (Director of Culture Ministry of Gender, Sports and Culture, Kenya) Mr. Aziz Dieng (Chairman BSDA, Senegal), Mr. Oupa Lebogo (Chairman of the Musicians Union Of South Africa, and Performing Artist, South Africa, November 2005) Mr. Eliot Ngubane, Performing Artist, South Africa (November 2005), Mrs. Betty Mould Iddrisu Chief Legal Officer, Commonwealth Secretariat and formerly Chief Legal Officer, Ministry of Justice, Ghana and Head of the Copyright Office. (March 2005)) Mr. Rob Hooijer. (CISAC Representative for Africa and Former Managing Director South Africa Music Rights Organisation (February 2006).

2.1.2. An Analytical Study of Music in Sub Saharan Africa from 1880 to 1950

Music in Africa has been vibrant for centuries and although most of it was oral, it survived successive generations. Just as any other form of culture, music was dynamic. The opening up of the continent to the Far East as well as the West had an impact on various musical styles and development of the industry within the continent. Various merchants, traders and other foreigners who travelled along and through the coast to access the continent heavily influenced music in coastal regions. Along the East African Coast for example, music has strong Arabic influence. The instruments found in the coastal regions are similar to those found in the Middle East. They were also influenced by Portuguese and Indian music. The story is similar in the West African coast whereby the North and South American, West Indian as well as Western influence can be traced in their music.¹⁷

The author shall in the following paragraphs examine the historical background and development of the music industry in sub Saharan Africa from 1889 to 1950.

(a) Ghana

Ghanaian *Highlife* is probably one of the oldest popular music dance styles in Africa. Its origins can be traced back to the 1880s and was a fusion of music from the West African Coast, Europe, the Caribbean as well as North and South America.

¹⁷ Although Ghana is not one of four countries used to test the hypothesis in this thesis, it has a well-documented history of the music industry and gives a clearer insight into the development of the music industry from 1880. It influenced the development of music in other West African States such as Nigeria, Senegal and the Congo. For further reading see John Collins, 'The Origins of Highlife in Ghana' Ghana Web July 27 2003 available at: http://www.ghanamusic.com/artman/publisher/printer_22.shtml. (Last Accessed June 2005).

Highlife developed into a distinct style that not only influenced music in Ghana, but also had an impact on music that was developing in Nigeria, the Congo and Sierra Leone.¹⁸ The fusion of different types of music within Ghana led to emergence of three distinct styles of *Highlife* music.¹⁹

The established music scene encouraged major international record companies to invest in Ghana. Ghana had the privilege of being one of the first African countries to benefit from investments by the international labels. Ghanaian music could be produced and sold within the region.²⁰ Major record labels namely Zonophone, Columbia and Odeon based in Ghana produced artists such as Jacob Sam, Kwame Asare, Mireku and Appiah.²¹ They were the pioneers of modern *Highlife* and their influence spread far and wide.

In effect this put Ghana on the music map, as its musicians were the trendsetters in West Africa. The *Maringa* style in Sierra Leone, the *Juju* music of Western Nigeria and the “dry” guitar music of Central Africa were greatly influenced by *Highlife*.

¹⁸ The first was the *Adaha*; this was predominantly found at the Fanti Coast in the south of Ghana and quickly spread to Nigeria. It was brass band music. The second was the *Fanti Osibisaaba*, which was a fusion of percussion instruments, guitars, and accordions that were inherited from the Liberian sailors. The third was what was known as *palm wine*. It was a blend of the traditional *Akan sepewa* and the contemporary music and was the basis of the current *Highlife* music in Ghana. For further reading see “The Evolution of West African Popular Entertainment” in: J. Middleton (ed.) (1999) *The Encyclopaedia of Sub-Saharan Africa*. London: Charles Scribner and Sons Reference Books, and John Collins. (1976) *Ghanaian Highlife. African Arts, UCLA, California*, Vol. 10, October.

¹⁹ The first was the *Adaha*; this was predominantly found at the Fanti Coast in the south of Ghana and quickly spread to Nigeria. It was brass band music. The second was the *Fanti Osibisaaba*, which was a fusion of percussion instruments, guitars, and accordions that were inherited from the Liberian sailors. The third was what was known as *Palm Wine*. It was a blend of the traditional *Akan sepewa* and the contemporary music and was the basis of the current *Highlife* music in Ghana.

²⁰ This point however is debatable as the record labels in the current times are seen to be the major beneficiaries at the expense of the Artists. It is common practice for the record labels to retain up to 70% of the profits made from the sale of music after they have recouped their costs and paid the royalties to the authors, composers and performers. See paragraph 2.3. The record labels play a major role in the shaping of the music scene as they are investors and provide opportunities to artists who would otherwise have no means of producing and marketing their music.

²¹ John Collins, *supra*, footnote 17.

The first western recording studio, Decca was set up in Ghana in 1948 to cater for the growing music industry. The recordings no longer needed to be made abroad and several artists from around the region came to Ghana to record their music. The music industry in Ghana was central in the establishment of music in the neighbouring English speaking West African countries namely Nigeria and Sierra Leone.

(b) Nigeria

In the early part of the 20th Century, Yoruba Music in Nigeria incorporated instruments from South America and percussions influenced by the Islamic culture. This led to the rise of Lagos *palm wine* music in the early 1920s, popularised by artists such as Baba Tunde King. With time, new artists came up with *Jùjú* music and by the 1930s, this type of music, was the most popular type of music in Nigeria. British record labels discovered the potential market and started recording *Palm Wine* music in Nigeria.²² Just like Ghana it led to the establishment of recording studios and the eventual investment by major record labels. *Jùjú* music is currently the most popular form of Nigerian music both within and outside the country.²³ By the 1940s, Nigeria had a well-established music industry from production to distribution.

(c) South Africa

South African musicians have over the centuries produced music that is an integral part of their culture. African music, which had a strong traditional influence developed alongside Afrikaans music.²⁴ *Jive* music and township jazz developed by

²² *Ibid.*

²³ George Seligman. (2000) "How record Companies Make Money" Paper presented Workshop of the World Bank and Policy Sciences Centre Inc on Developing the Music Industry in Africa', Washington DC June 21, 2000.

²⁴ The Afrikaans folk music had a strong influence from Indonesian music and some German and African influence as well.

Africans together with Afrikaans music was to form the backbone of South African Music.²⁵ The apartheid regime played a role in the development of the various types of music. The Black [sic] South Africans used music for self expression and came up with soulful music that would define the music industry in South Africa. Township Jazz also developed and was played in the various clubs within the townships. The vibrant music industry encouraged investment by major international recording companies such as EMI, BMG and Sony in the 1940s. Gallo started its operations in South Africa in the 1930s.²⁶

(d) Senegal

In Senegal, music was deeply rooted in the folk tradition and culture of various communities found within the country. The performers were commonly 'griots' whose positions were inherited through the patriarchal lineage. The '*griots*' performed ceremonial roles and were the ones in charge of passing on information from one generation to another.²⁷ With the colonisation by France, there was an influx of French music, which suppressed the traditional Senegalese music.²⁸ The colonial regime was instrumental in shaping the legal and institutional capacity especially with regard to copyright.²⁹

²⁵ *Jive* is genre of music that developed in the townships in South Africa during apartheid. It developed alongside the township jazz that was influenced by traditional South African Music as well as jazz and blues from the United States. See Article by F. Hills. "Kwaito's looking sharp!" on 9th April 2003 available at: http://www.southafrica.info/ess_info/sa_glance/culture/kwaitodoc.htm. (Last accessed in May 2005).

²⁶ Gallo represented the interests of Universal records. For Further reading see "The South African Music Industry" Final Report to the Department of Arts, Culture, Science and Technology November 1998.

²⁷ See Report prepared for UNCTAD by Andy Pratt. (2004) "The Music Industry in Senegal: The Potential for Economic Development. 11th March 2004.

²⁸ The French used the Assimilation Policy within their colonies and that meant that they were treated as extensions of France. The locals were forced to adopt the French way of life including the language, culture etc.

²⁹ See paragraph 3.1 to 3.3.

Musicians had their music recorded in France as opposed to setting up their own studios in Senegal. This in effect allowed the cultural development of various communities. Countries such as South Africa, Kenya and Nigeria all developed popular local dance music prior to independence.³⁰

2.1.3. An Assessment of the Development of Music from 1957 to 1980

The late 1950s and early 1960s saw rapid growth of music in various parts of Africa. It was around this time that countries in Africa began to gain their political independence.³¹ Changes experienced during this period not only had an impact on the political and economic landscape but also shaped the music industry.³²

From the 1960s right through the 1970s, most African countries gained their independence and were experiencing an economic boom.³³ The emerging middle class had a high disposable income. Part of this income was spent on entertainment including music. Artists like Daniel Kamau (DK) of Kenya, Fela Kuti of Nigeria, Osibisa and many others, each sold over 250 000 copies of a single popular album.³⁴ The vibrant music scene encouraged international recording companies and labels to invest in Africa.³⁵

³⁰ John Collins. (2000) "World Music- World Wide Sales" Paper presented at the Workshop of the World Bank and Policy Sciences Centre Inc on Developing the Music Industry in Africa, Washington DC June 20 2000 available at: http://www.worldbank.org/research/trade/pdf/IP_handout2_collins.pdf.

³¹ In 1957, Ghana was the first country to gain independence in Africa from Britain.

³² These factors, as will be discussed in Chapter 4 below have a bearing on the enforcement of music.

³³ Except Namibia, Zimbabwe, South Africa.

³⁴ Interview with Mr. Mike Andrews of AI Records in Kenya (formerly of PolyGram Records in Kenya).

³⁵ By the 1970s, Ghana had four recording studios and two record processing plants with an output of over 500 000 records per year. These companies were able to meet the demand for the music especially in West Africa.

Unauthorised commercial use was not a major problem through the 1970s and early eighties due to the high cost of duplicating vinyl disks as well as proliferation of live bands. As the music industry continued to grow, it was dominated by live performances and bands. In Kenya, most live music was by bands from the DRC who moved to Kenya due to the unfavourable political situation in their country at that time. There was a fusion of local and regional music. Live acts were a common phenomenon all over Africa. Senegal, Cameroon, The DRC, Ghana, Nigeria among others all enjoyed live performances by various artists from all over the continent.

Music festivals within South Africa by both local and foreign musicians served to encourage live performances that in turn increased the sales of the music and popularised the featured artistes. During this period, there was a boom in the music industry.

The 1970s ushered in the era of “disco” which, coupled with various political social as well as economic changes lead to a decline in live performances. Nigeria experienced political strife and a decline in the economy.³⁶ The economic boom started waning and by the end of the 1970s, it started taking its toll on the once vibrant music industry. Kenya was not spared from this wave of disco music and several nightclubs closed. In countries like the DRC and South Africa, although the live performances reduced, they still managed to survive the disco craze due to the strong cultural roots of live performances.³⁷

³⁶ In Ghana, the change in governments, night time curfews and economic decline affected the music industry. Various known artists decided to move away from Ghana in search of greener pastures.

³⁷ In South Africa as mentioned earlier, the jazz festivals and concerts helped maintain the demand for live music.

In the DRC the change in political leadership was instrumental in the development and spread of Congolese music to East and Central Africa.

When The Late Mobutu Sesesekou took over as the leader of the country through a military coup, he came up with the “Africanisation” process whereby everything including the music was to be Africanised. ‘Africanisation’ is the term that was used to describe a process whereby everything was to revert to being African, where there were Western names, they were replaced with African names. Indeed, the President himself changed his name to Mobutu Seseskou. The mode of dress was also changed from Western to African.)

With the prevailing political conditions, various artists fled the country and set up base in other countries. Some known artists moved to France while others moved to neighbouring countries in East and Central Africa. Others remained in the country and occasionally went to France to record their music. This marked the beginning of proliferation of Congolese music and dance styles in east, central and southern Africa.

Other than political changes, there were other factors that helped chart the course of the music industry in Africa over the last fifty years. These include social, economic and technological development within the continent.³⁸

³⁸ The Structural Adjustment Programmes (SAPS) that were introduced by various developing countries in the 1980s at the behest of the World Bank wrecked havoc to the various economies and this in turn had a negative impact on the music industry. The level of disposable income dropped and the middle class shrank while the gap between the rich and the poor widened. In fact by the early 1990s, music was considered a luxury and the purchase of music was the preserve of the rich. The SAPS were initially introduced to help alleviate poverty in the developing countries with surprising results; poverty increased. They were largely criticised on the grounds that they were a foreign imposition on the economy of a sovereign state and that they increased the level of poverty within the states which implemented them such as Kenya, Zambia, Tanzania among others. Countries that rejected the SAPS have fared much better in terms of poverty alleviation, economic and industrial development. The World Bank and the IMF have since replaced the SAPS with a new approach based on the so-called Poverty Reduction Strategy Papers. ‘From Structural Adjustment to Development Policy Lending: Has the World Bank learnt from past experiences, and what the research and policy challenges are?’ <http://siteresources.worldbank.org>, and www.worldbank.org on SAPS and

(a) Nigeria

When Ghana gained independence in 1957, Kwame Nkrumah endorsed *Highlife* and encouraged the formation of two music unions to represent the interests of highlife musicians. He set up government sponsored *Highlife* bands and concerts. This was a boost to the local *Highlife* music. Theatre groups through their “concert party” shows by their *Highlife* guitar bands popularised the music across the country. It spread to Nigeria where artists like Victor Olaiva, Bex Lawson and Bobby Benson came up with *Yoruba* and *Ibo Highlife* dance bands. Other notable artists from both Nigeria and Ghana include Victor Uwaifo, Chief Osita Osadabe, Koffi Sammy and Konadu³⁹. Prominent artists Fela Anikulapo-Kuti and Osibisa brought *Highlife* to the international arena. *Highlife* has since declined in Nigeria and has been replaced by Afro beat.

Nigeria had its share of recording studios and labels. By the late 1970s, it had four recording studios with an output of over 20 million units annually.⁴⁰ Multi-national companies invested in the local artists, some for the local market while others were packaged for the international market.

(b) South Africa

“The music industry, however, like any South African industry, is infused with the legacy of apartheid's political economy. As a cultural industry, the music industry suffered additional setbacks because indigenous culture was actively suppressed and distorted by the apartheid regime. One of the most devastating aspects of this legacy is that *local* music is not developing as fast as it should.

development. See also Bernard Sihanya (2003) *Constructing Copyright and Literary Creativity in Kenya* Unpublished Doctoral Thesis, Stanford University. p. 19.

³⁹ John Collins *supra*, footnote 17.

⁴⁰ *Ibid.*

Eighty per cent of the music sold in South Africa is international. While international music is thriving in the South African market, the development of local music is not keeping pace. Likewise, live music venues and productions are not thriving in South Africa.⁴¹”

Various musicians left the country and set up base elsewhere including Miriam Makeba, Jonathan Butler, and Hugh Masekela among others.⁴² They kept South African music alive to the rest of the world. Others such as Sipho Mobuse, Caiphus, Semenya, the African Jazz pioneers remained in South Africa having developed the distinctive afro jazz or township jazz as well as *Jive* music. Throughout the apartheid era township jazz and jive music, like soul music in the United States among the African Americans, continued to thrive.

Township jazz was a fusion of African American rhythm, blues and jazz with traditional music especially from the Zulu and Sotho people.⁴³ The style was popularised by musicians like Hugh Masekela, Mahlathini and Ladysmith Black Mambazo. This brand of music developed in the 1950s at the height of passive nationalist resistance against the nationalist Government’s institutionalised racism. It, however, declined as the artists who had popularised it such as Hugh Masekela, Dollar Brand, Johnny Gertse, Sammy Moritz and Jonas Gwangwa left the country due to the increasingly repressive political situation.

⁴¹ Music Industry Task Team (MITT) Report Department of Culture 1998 (on file with the author). The prevailing political conditions as illustrated South Africa have a bearing on the development of music and music copyright and subsequently on enforcement. This will be discussed in greater detail in paragraph 4.2

⁴² This was an oppressive system against the majority Africans who sought to assert themselves through their music as they had done in the previous years.

⁴³ The African American jazz had a profound influence on the development of township jazz in South Africa and this can be traced back to 1890 when the minstrel troupe of Orpheus Myron McAdoo’s Virginia Jubilee singers presented a series of concerts in Cape Town. See Article submitted on behalf of Hotep Idris Galeta on 25th November 2003 available at: <http://www.allaboutjazz.com/php/article?id=889>. (Last Accessed May 2005).

There are however some who stayed and continued to nurture jazz in South Africa. *Jive* on the other hand, a trend popularised by Moses Mchunu, was township street music that was influenced by American Swing and modern electric versions of the Zulu traditional music.

Despite the prevailing political situation the music industry continued to grow. The end of apartheid era in South Africa in the early 1990s marked the entry of a new genre into the South African music scene. *Kwaito*, the music that evolved from the 'ghetto' would later be compared to hip-hop in the United States in terms of its evolution and appeal. It captures the daily experiences and dreams of 'ghetto' life and is characterised by digitally generated music. It is purely a South African dance music with popular artists like TKzee, Ismael, Zola, Bongo Maffin to name a few.⁴⁴ The older generation of artists and listeners do not quite approve of Kwaito music but it has gained popularity among the younger generation and made a mark in the music industry in South Africa.⁴⁵

Very few artists in South Africa have been able to bridge the racial, cultural and linguistic differences that characterise the both South African society as well as its consumption of music. The collapse of apartheid and the industry's reintegration into the global market provided musicians with an opportunity to integrate traditional sounds with other musical cultures and hopefully appeal to all within the country.⁴⁶

⁴⁴ See Article by Frank Hills "*Kwaito's looking sharp!*" on 9th April 2003.

⁴⁵ See paragraph 2.3.

⁴⁶ See 'The South African Music Industry; The Cultural Industries Growth Strategy (CIGS)' Report to the Department of Arts, Culture, Science and Technology November 1998 p. 58 available at: www.dac.gov.za/reports/music-pub-film-craft/musfin1.doc.

Major record labels such as Sony, Universal and Gallo were already represented in South Africa. Collective management was already in place with the presence of SAMRO. The record industry also had its own association, Association of South African Music Industry (ASAMI) now known as the Recording Industry of South Africa (RISA).

(c) Senegal

In Senegal, independence brought about interesting developments in music. The existing French music that had taken root during the colonial period was modified through popularisation of Latin American styles as well as North American soul and rhythm and blues. With time, these were blended with the traditional Senegalese instruments as well as the local languages.⁴⁷ Senegal has experienced economic hardships but these have not affected the growth of the dynamic music industry mainly due to the strong cultural policy. President Senghor had a policy of negritude that helped in the development of strong cultural policies. This contributed to the music industry as a whole as the Government supported various initiatives by cultural industries including music.

(d) Kenya

In East Africa, Kenyan music was seen as the bedrock of East and Central African music. The music can be traced to the *Benga or Chakava* music whose origins lie in the Lake Victoria region in western Kenya. During the 1970s as well as the 1980s there was a vibrant music industry and Kenya and Tanzania were host to various artists from the DRC (then known as Zaire) such as *Mangelepa, Orchestra Virunga, and Zaiko Langa Langa*. Tanzanian artists and bands such *Simba Wanyika* was also

⁴⁷ Andrew C. Pratt *supra*, footnote note 27.

resident in Kenya. At that time, Kenya offered a favourable environment for performing artists from Central and Eastern Africa. This was due to three main factors: first, the political stability that the country was enjoying. Second, the country was the economic powerhouse within the region and there were various international labels and recording studios. Third, due to the favourable economic climate, Kenyans had more disposable income; they used it on entertainment and other luxuries. Kenyan artists such as Daniel Kamau and D.O. Misiiani dominated the local scene and popularised the *benga* sound. In Tanzania, Remy Ongala dominated the airwaves.⁴⁸

There were two international labels operating in Kenya one of them being PolyGram Records. As Kenyan music gained popularity among European audiences, there were several artists and bands that were produced by other major labels such as Virgin Records and Afro Rhythms.⁴⁹

From the above discussion, it is evident that the composers and authors form the core of the music industry while the producers along with the record companies are the driving force in the industry. The author further notes that the music industry consists of the rights holders and investors.⁵⁰ The record companies only invested where they are likely to get high returns, as was the case in Nigeria, Kenya and South Africa. But due to lack of enforcement of copyright laws, they opted out of most countries in sub Saharan Africa.

⁴⁸ In the Coastal region, Taarab music and Bango music became popular. Taarab is Swahili music that has a very strong Arab influence in terms of the instruments used and the style of music. Bango on the other hand was a form of Swahili Rumba.

⁴⁹ Examples are Orchestra Makassy and Super Mazembe under the Vrgin Label and Orchestra Virunga Afro Rhythmns.

⁵⁰ See paragraph 2.2.

2. 1.4. An Examination of the Impact of Technology on the Music Industry (1980 to Present)

This period was marked by two major technological changes in the production and dissemination of music. The first saw the shift from vinyl discs to music cassettes and the second was the digital technologies.

(a) The Advent of Music Cassettes and “Disco”

The introduction of music cassettes facilitated the reproduction of music at a lower cost than vinyl discs. Enforcement of music copyright became an issue.⁵¹ This ushered the rapid decline of the music industry in Africa. Two main factors that contributed to this decline were “disco” and introduction of music cassettes. The advent of “disco” which relied on recorded music took over from live performances. It was precipitated by the lower cost of hiring a disc jockey in comparison to what would be paid for the live bands.

Live music was no longer in demand causing many nightspots that featured live bands to close, as they could not compete with the discothèques. The situation was exacerbated by the advent of the music cassettes (MCs), which not only changed the music industry but also facilitated the unauthorised dissemination and use of music. Whereas it was previously expensive to manufacture and duplicate vinyl discs, MCs made it cheap and easy to duplicate music. Several record labels found it unprofitable to continue operating in several countries in Africa thus pulled out and existing pressing plants closed.⁵²

⁵¹ Technology is one of the factors that influence the effective enforcement of music copyright as will be discussed in paragraph 4.2.4.

⁵² EMI and Decca both pulled out of Nigeria while PolyGram wound up its business in Kenya, as it was no longer profitable to operate.

By the late 1980s, there were no manufacturing plants in sub Saharan Africa except in South Africa.⁵³

From the informal interviews carried out by the author during the course of research, it was evident that the influx of foreign music particularly from the United States and the United Kingdom affected the consumption patterns. Majority of the population listened to foreign acts and shunned local music.⁵⁴ It was considered fashionable among the youth to listen to foreign repertoire. The decline in live performances also contributed, as people were no longer constantly exposed to local music.

In countries like Senegal and Mali, technology seemed to have a different effect on the music industry mainly because most of their music was mastered and recorded in Paris. This not only created exposure of their music to Europe and the rest of the world but also guaranteed quality productions. In fact, during this time, there was a major shift in the music industry. It was characterised by the introduction of electric instruments, which were fused with traditional instruments to create a unique Senegalese sound now known as *Mbalax*. The introduction of music cassettes and other recordable media made it possible to disseminate music further.⁵⁵

⁵³ This led to loss of jobs and musicians were left at the mercy of independent producers. These producers were not regulated and operated purely as business concerns. They did not have any specific guidelines. The once vibrant live band scene was relegated to the archives. Cheap imported pirated music flooded the market stifling the local industry. The slump in secular music seemed to have paved way for gospel music.

⁵⁴ Interviews with Mr. Oupa Lebogo Secretary General Musician Union of South Africa (Now CUWUSA), Mr. Tabu Osusa, Producer Kenya and Mr. Aziz Dieng President of the Association of Senegalese Musicians (AMS).

⁵⁵ *Mbalax* Style, literally 'rhythms and drums' available at: <http://www.artandculture.com/arts/movementId=720>.

It was during this time that Senegal brought its music to the rest of the world. Renowned Francophone artists like Youssou N'dour,⁵⁶ Salif Keita, Baaba Maal and Mory Kante have made their mark in the music scene and sell their music both within and outside the continent as well as other countries.

Various artists tried to cope with the rapid decline of the music industry. There was an unprecedented growth of gospel music. There was a spiritual revival that swept across the continent especially in countries like Kenya, Tanzania, Zimbabwe, Ghana and Nigeria. Several secular artists changed to gospel. This was attributed to high levels of piracy as well as the low cost of producing gospel music. It is notable that Churches and religious organisations were exempt from paying duty on equipment. Production of gospel music was thus cheaper and readily available to the market at affordable prices. Gospel music consisted of local creations, western sounds or a fusion of both and formed a strong basis for the music industry in Africa. While sales of secular music declined, gospel music sales increased.⁵⁷

Several secular artists in Nigeria like Sonny Ade, Ebenezer Obbey and Sonny Okosun all shifted to Gospel music. In Kenya artists like Joseph Kamaru turned to gospel music. Gospel artists like Feston Munishi and local church choirs flourished while the secular artists were rapidly closing shop and turning to other businesses.⁵⁸

⁵⁶ In 1994 he sold over 1.5 million copies of his single with Neneh Cherry "7 Seconds" and "La cour des grands" also sold over 1million copies.

⁵⁷ Interview with Japheth Kasanga of Kasanga Productions. He is a performing artist and one of the leading producers of Gospel music in East Africa in February 2006.

⁵⁸ Phil Hardy. (1997) *'Africa 1997: The Music Industry Markets of Ghana, Kenya, Nigeria and Zimbabwe'*; Article from Music and Copyright 113, May 1997 as reported by Phil Hardy, 'The Possible Structures for the Collective Management of Authors' Royalties' available at: http://www.worldbank.org/research/trade/pdf/IP_handout/pdf.(Last Accessed 2006).

It was also around this time that the label “World Music” was coined by major music labels. The main aim of introducing this was to cater for the increase in music from Africa, South America and Asia. Prior to that, the music could normally be found in specialist shops but the growing demand for the music necessitated the sale of the music through the established distributors in Europe and North America.

(b) The Impact of Digital Technologies on the Music Industry

Advances in digital technology brought about the second technological development that would influence the music industry affecting the production, reproduction, marketing and distribution of music. The quality of reproduced music was similar to the original and the cost of reproduction was lower compared to the music cassettes and vinyl records. With the digital technologies came various challenges to the music industry. Music could be mastered and produced digitally then recorded onto the CDs. The quality of the reproduced music was as good as the original. CDs were an improvement on the MCs whose quality deteriorated with subsequent duplication.

The emergence of and digital recording equipment made it easier to record music as not much expertise in terms of musical instruments was required to produce music. Instrumentalists such as guitarists, drummers and pianists were sidelined as various recording studios used digital technology instead of live performers. This led to emergence of new genres of music within the continent. In South Africa these technologies led to the emergence of *Kwaito*, which became quite popular with the younger generation.⁵⁹

⁵⁹ See paragraph 2.2.1 above.

In Kenya and Tanzania, the mid 1990s saw the emergence of local hip hop and dance music popularly known as *Genge* and *Bongo Flavour* respectively.⁶⁰

Digitisation of music files made it possible to transmit large volumes of music via the Internet although most artists would record their music onto MCs. These technologies enabled users, both domestic and commercial to access the music via the Internet. Although this opened avenues for distribution, easy duplication and dissemination of music also created problems for the rights holders. It facilitated unauthorised commercial reproduction along with distribution of recorded music by third parties. This, as will be discussed in paragraph 4.2.4 is one of the factors that influences enforcement in the music industry.

Record companies had to start thinking digital in terms of marketing and distribution of their music if they were to stay ahead.⁶¹ Emerging from this is a form of illegal use of music that costs the industry millions in terms of lost revenue.⁶² In such cases, infringers argue that they are simply catering for users who the right holders have not provided for. Third parties take advantage of the gap in the market and supply the music online.⁶³

⁶⁰ In Kenya, the first generation hip-hop artists emerged in the mid 1990s, namely Hardstone, Kalamashaka, K-south and the late Poxi Presha. In the new millennium artists such as Nameless, Nonini, Deux Vultures, Redsan among others popularised the new trend. In Tanzania, *Bongo Flavour* can be traced back to 1995 with the Kwanza unit. The most recent acts include Mr. Nice and Lady Jaydee.

⁶¹ It is common for instance for Kenyans living in the United States or the United Kingdom to have access to Kenyan Music online even in cases where the record companies, producers or artists have not made their music online.

⁶² Sale and distribution of music online is an exclusive right granted to the rights holder and any party wishing to do so need express authority from the rights holder.

⁶³ Interview with Mr. Aziz Dieng. This will be discussed in greater detail in paragraph 4.2.4 on the impact of technological advances on enforcement of music copyright.

Societal perceptions as will be discussed in paragraph 4.2.3 have a bearing on enforcement of music copyright in sub Saharan Africa.

Digitisation of music has also brought a new dimension to the music industry whereby artists may do away with record companies. They make their music available online. This is still quite a new concept for local artists in most countries in Africa where the artists prefer the traditional approach.⁶⁴

The mushrooming of FM radio stations also had an impact on the music industry. In previous decades, radio stations were normally State-owned and there were hardly any independent radio stations. Initially, FM radio stations played foreign repertoire at the expense of local music. They argued that most local artists had not changed to the digital format, which was a requisite to having the music played on their stations. To address this problem, South Africa came up with a quota system whereby the radio stations were required to play a certain percentage of local content. It ensured that the local musicians enjoyed enough airplay, which would serve as a marketing tool for their music. In Kenya, over 90% of the music played by FM stations in the late 1990s and early 2000s was of foreign origin. Some stations had 100% foreign content.

In the absence of live performances, local artists had limited platforms to showcase their works. Within the last few years, FM Radio stations included local repertoire, which has popularised the new generation of artistes. This helped the dissemination of music that would otherwise have received no airplay in more traditional radio stations.

⁶⁴ *Ibid.*

In Senegal, local repertoire played by FM stations is less than 30%.⁶⁵ Various artists interviewed in Kenya, Senegal, South Africa and Nigeria were of the considered opinion that FM stations had the potential to promote local artists. They were however sceptical as some radio stations demanded that they pay them to have their music played. In other cases, the stations got hold of demos before the music was released and thus encouraged the unauthorised recording of the music. Artists in Senegal and South Africa were content with their collecting societies, which collected and distributed their royalties. The situation in Kenya and Nigeria is different, as collective management societies have not been functioning well. FM stations have taken advantage of this situation and refused to remit the royalties.⁶⁶

From the foregoing, the author notes that the prevailing political climate, the economic conditions within a given country, the societal perceptions of music and technological advances influenced the development of the music industry.⁶⁷

2.2. An Overview of Key Stakeholders in the Music Industry

The music industry in sub Saharan Africa involves composition, production, reproduction, marketing and distribution of music. Each stage is important and involves various rights holders.⁶⁸ Music undoubtedly is one sector in the copyright industry that is defined by different rights some of which accrue to different right holders. It is imperative to identify key players and their role in the music industry.

⁶⁵ *Ibid.*

⁶⁶ See paragraph 5.6.1 for further discussion on collective management organizations.

⁶⁷ See paragraph 4.2.4.

⁶⁸ See paragraph 3.3.4.

The structure of the music industry is quite complex as it is defined not only by the physical products but also the rights that are attached to these works and the royalties payable. The rights are as varied as the various players within the music industry and these can be assigned or licensed to third parties. These include the composers and authors, publishers, performers and the record companies.

They create complex systems of rights management and transfer as well as income generation that could be national, regional or global. To quote Gerald Dworkin;⁶⁹

“ It should be stressed...that a musical work is the composition, not any particular performance or recording of it, and that a sound recording, on the one hand and the music played in the sound recording on the other, are quite distinct and separate types of copyright work.”

The music industry involves several players from the point of composition to the retail of the final product. The first step involves the composition of the lyrics and the melody. These are recorded into tangible format. After recording, music is reproduced commercially then marketed before it is distributed and finally purchased. Different parties carry out these steps. For instance, authors together with composers write and compose lyrics as well as melody while recording, manufacturing and record companies or independent producers deal with marketing. In developing countries such as Kenya and Senegal, the process may be carried out by the same entity. The first and second parts are not much of a problem in developing countries. The problem lies with manufacturing, marketing and distribution of music, which is capital intensive.

⁶⁹ G. Dworkin. (1990) *Blackstone's Guide to the Copyright and Designs and Patents Act 1988*. Blackstone Press Limited. p.25.

Several developing countries like Kenya do not have the capacity to set up manufacturing plants and these services have to be sourced from outside the country. This creates problems especially in the area of enforcement as will be discussed in paragraph 4.2.5.

2.2.1. Composers and authors

Music has two components, lyrics and music. These are two creative acts, that of the songwriter who writes the lyrics and the composer who writes the tune. They are the originators of music without which the industry would not exist as record companies rely on their creativity. The composer has the copyright in the music in a song while the songwriters have the literary copyright in the song. It is important to note the distinction between the music and the lyrics.

2.2.2. Performers

Performers also play an important part in the music industry, as they are the ones who bring the written music and compositions to life through their performances that are either live or recorded. They could be independent persons or the composers and authors themselves. Record companies use performers who may be the same as the composers and authors or they could engage the services of other persons in order to record music. The performer will only have a right in his/her performance but cannot stop others from a separate performance based on the same work.⁷⁰

⁷⁰ It is important to note that in a musical work, the author may also be the performer.

2.2.3. Recording Studios

Recording studios are a fundamental part of the music industry. From the history discussed above, the first recording studios were established in countries like Nigeria, South Africa and Ghana as far back as the 1930s.⁷¹ Nigeria has one of the most advanced recording studios in the region.⁷²

(a) Kenya

By the 1960s, Kenya had two main recording studios that unfortunately wound up in the 1990s due to the increasing levels of unauthorised commercial use, which rendered their businesses unprofitable. Local artists were forced to record their music outside the country increasing costs of production. There were however small-scale recording studios that offered their services to performing artists.⁷³

The cost of importing recording equipment was prohibitive due to high import duties that they attracted. Several artists opted to have their music recorded outside the country.⁷⁴ By 2005, it was estimated that there were at least 25 legitimate recording studios in the country.⁷⁵

⁷¹ Gallo started producing music in South Africa in 1933 while the international record companies started recording music in the 1930s. In Ghana, Decca, the first recording Studio was set up in 1948.

⁷² R. Graham. (1992). *The World of African Music: Stern's Guide to Contemporary African Music, Volume Two*. London: Pluto, p. 588.

⁷³ These were mainly found in River Road in Nairobi.

⁷⁴ Other artists like Five Alive, Zanziki, and Them Mushrooms among others had their music reproduced in the United Kingdom and Germany and later in South Africa.

⁷⁵ These are figures obtained from Suzanne Kibukosya, Julie Gill, and Japheth Kasanga who are all Council Members of the Kenya Association of Music Producers (KAMP), in an interview in February 2006 at the Samawati Studios in Nairobi.

Very few artists could afford the costs of production locally and after recording their masters; they sent their music to other countries such as Pakistan, Tanzania, United Kingdom and South Africa to have it duplicated.⁷⁶

(b) Senegal

For Senegal, recording had to be done in Europe for the better part of last century.⁷⁷ It was not until the 1970s that recording facilities were available in Cote d'Ivoire and Senegalese musicians had an option of recording their music in Africa as opposed to travelling all the way to Europe. The first recording studio was established in the late 1970s. There are currently two international recording studios in Dakar, Senegal, Studio 2000 and Xippi.⁷⁸

2.2.4. Record Companies and Independent Producers

The producer of a sound recording is the person who or company that affixes the music onto a sound recording. It could either be a record company or an independent producer. Record companies are the heart of the music industry. They record the music, promote artists, manufacture or ensure the manufacture and distribution of the sound recordings. They create a package by combining the talent of the authors and composers with the performers whom they believe are acceptable in the market.⁷⁹

⁷⁶ Most of the music produced in Kenya is not professionally done and the quality tends to be very low. The pirated copies from Tanzania and Pakistan are of higher quality than legitimate copies.

⁷⁷ The music was recorded mainly in Paris and to some extent in Belgium.

⁷⁸ The two are both locally owned, the former by the Cultural Pyramid of Senegal and the latter by Jololi and Youssou N'Dour.

⁷⁹ Record companies are responsible for shaping of the music market. Recently, we have witnessed the phenomenal marketing of various artists by record companies. There are many artists who sell mainly because of the aggressive marketing by the record labels especially in Europe and the United States. They survey the market and decide what is to be released yet in reality, they create the stars. Any act that does not sell within their projections is quickly dropped.

Record companies have for a long time defined the music industry especially as investors. They invest in markets that guarantee them the best returns and are reluctant to invest in markets where their returns are not guaranteed. As previously discussed in Paragraph 2.1., it was notable that the record companies invested in Kenya Ghana and Nigeria in the 1940s and 1950s but when the music industry began to decline in the late 1980s and 1990s they withdrew from the market. They however remained in South Africa.

In the 1950s and through the early 1980s, major record labels did not hesitate to invest in several sub Saharan countries, as it was profitable to do so then. In fact, prior to the 1990s, major record companies had invested and were fully operational in Nigeria. In South Africa, they still control close to 92% of the market with the independents taking the remainder.⁸⁰ In Kenya and Nigeria local record companies and independents dominate the markets. The record companies act as a centre for the music industry and in their absence the music industry is fragmented.⁸¹ This affects the operation of the industry especially with regard to enforcement of music copyright.⁸²

In an exercise carried out by the Copyright Office in Kenya and the Kenya Association of Music Producers (KAMP) in 2002, the members of KAMP were asked to define the roles of various rights holders within the music industries.

⁸⁰ Sony/ BMG, EMI, Universal all have subsidiaries in South Africa while Warner has licensed Gallo to operate in South Africa. See "The South African Music Industry" Final Report to the Department of Arts, Culture, Science and Technology November 1998. p.28.

⁸¹ In sub Saharan Africa, South Africa and Nigeria are the only countries with well-developed music industries. In South Africa, the presence of the big five is a contributing factor. In Nigeria, the local labels are organised giving the industry direction.

⁸² Independent producers are found in smaller markets. They are different from independent studios. Interview with the interim Chairman and directors of KAMP in July 2005, Nairobi, Kenya.

From the document presented to the Copyright office, it was clear that there was confusion as to who an independent producer was. The issue prompted the Copyright Office to compile a definition of terms.⁸³

2.2.5. Agents, Managers and Promoters

They usually work on behalf of artists to secure record deals, publishing contracts, and live performances among other things. Agents scout around for recording deals; secure contracts and performances for the artists. Managers run the day-to-day affairs of the artists, for instance, they negotiate contracts and recording deals.

2.2.6. Music Publishers

The role of a music publisher can be traced back to the time when music was printed in the form of sheet music. They were responsible for printing and sale of sheet music. In recent times, their role includes publication of musical works by composers and authors, promotion of authors and administration of royalty payments. Publishers retain the music catalogue and are known to acquire catalogues from the various record companies and artists. According to Sarah Faulder, the Chief Executive of the Music Publishers Association the publisher's role is; to find sign on, develop and support talent, promote and market the music, as well as edit and produce performance materials.⁸⁴ They publish musical works as composed by songwriters and lyricists. Major record companies often own publishing companies.

⁸³ Document on file at the Kenya Copyright Board Office, Nairobi.

⁸⁴ Sarah Faulder. (2004). "The Music Business in the UK." Paper presented at the WIPO/British Copyright Council on October 27, 2004.

In most countries in sub Saharan Africa, the role of the publisher is not clearly defined and is more often than not confused with that of a producer of sound recordings. In Ghana for instance, the music industry has no role for the publisher in the music industry. It could be attributed to the fact that by the time music was being commercialised in Africa, the role of the publisher had diminished and several publishers had shifted to traditional areas of recording such as matching repertoire with the artists. Others established their own studios and contracted artists to record demos.⁸⁵

In Kenya, the situation was somewhat different as the “publishers” who had registered with the Music Copyright Society were in actual fact owners of recording studios or independent producers.⁸⁶ In South Africa, the main record labels have publishing houses as well and these include Gallo Music Publishing and Sony/BMG Publishing.

2.2.7. Broadcasters and users

Various artists and producers were of the opinion that delivery of music to consumers is essential to the music industry. Broadcasters deliver music to consumers through the airwaves whose power cannot be underestimated. Music that receives a lot of airplay is likely to transform into more sales.

⁸⁵ Roger Wallis and Zelijka Kozul-Wright. (2001) “Best Practice Cases in the Music Industry and their Relevance for Government Policies in Developing Countries” WIPO UNCTAD Report December 2001.

⁸⁶ When the Music Copyright Society was undergoing restructuring, they had to leave the organisation and the producers of sound recordings were advised to form their own collecting society. Report of the Restructuring of the Music Copyright Society of Kenya (MCSK), Copyright Office, Office of the Attorney General September 2001. (Document available at the Kenya Copyright Board (KCB) offices, Nairobi, Kenya). The chairman of the Kenya Association of Music Producers also confirmed this.

According to Mr. Oupa Lebogo, MUSA, South Africa, and Mr. Tabu Osusa, a producer in Kenya, broadcasting is one of the biggest and most effective marketing tools for music. If broadcasting stations shun a particular artist, it might as well be killing his career in the music business. Broadcasting stations always claim to provide music in response to market demand while in actual fact they are the ones who determine which music the consumers end up listening to.

From the 1980s to 1990s, most music that was played by radio stations in East Africa was mainly from the US or the UK and the consumers ended up having a preference for that music as opposed to the local music. The trend has however changed in recent years with the emergence of the “new generation artists” who receive massive airplay especially on the FM stations creating a higher demand for the local music.⁸⁷ However, foreign music still dominates the airwaves.⁸⁸

Broadcasting stations, individuals, entertainment houses, public vehicles among others all fall into the category of music users. Consumer preferences have to be taken into account when producing and marketing music. There are different genres of music the world over. In most African countries there is a general preference for music from the United States, namely Soul, Rhythm and Blues and Hip Hop among the younger generation. The sales account for over 60% of the legitimate music sold in South Africa for instance.⁸⁹

⁸⁷ These include artists of the emerging genres of music across sub Saharan Africa such as the *Genge* artists from Kenya *Kwaito* from South Africa and *Bongo* from Tanzania.

⁸⁸ The Government in countries like South Africa have introduced a local content quota to ensure that the local music receives generous airplay and this has done a lot to boost local music.

⁸⁹ It is difficult to give the exact percentage from most African countries, as they do not have well-established distribution and tracking systems.

In Malawi, 85% of the legitimate music consists of local repertoire.⁹⁰ In Kenya, over 80% of the legitimate sales are of local repertoire most of which are music cassette format.

Appreciation of music from other African countries among local users has increased. This may be attributed to factors such as concerts, and proliferation of satellite television that showcases artists from within the continent.⁹¹ Disposable income in a given country also dictates the consumption of music. In countries where consumers are hard pressed for cash, they are unlikely to spend more on music, which will affect the sales.⁹²

A distinctive feature in sub Saharan Africa is the higher sale in the music cassettes than the CDs except in South Africa where the sale of both is on the increase.⁹³ In Senegal, in 2004-2005, the number of music cassettes sold was one million but they did not have data on the sale of CDs as the banderols were only applied to the music cassettes.⁹⁴ In Kenya, Nigeria, Senegal and South Africa a survey of the market indicates that reducing price of CD players has increased the use of music in CD format although the music cassette continues to be used in the market. In Nigeria and Ghana, and South Africa both the CDs and music cassettes are readily available on the market.

⁹⁰ Figures based on Communication with Mr. Rosario Kamanga of the Copyright Society of Malawi May 2006.

⁹¹ Examples include Channel O on MNET and more recently MTV Africa.

⁹² The Director of Culture at the PAWE/MUSA Merger Road show Launch Held on 4th November 2007, Johannesburg, South Africa underscored this point during his keynote address. The participants at the launch who included the musicians and performers concurred.

⁹³ Interview with Rob Hooijer.

⁹⁴ Interview with Mr. Aziz Dieng.

Users play an important role when it comes to enforcement of copyright in the music industry. Producers in Kenya and South Africa were of the considered opinion that lack or limited knowledge on copyright contributes to the decline in music sales. Where users are well informed, the incidence of unauthorised use is lower than in cases where they are ignorant of the law and rights contained therein.

Users need to be well informed and sensitised about copyright protection as well as the importance of complying with the law. It should be linked to overall economic, cultural and technological development within a given jurisdiction.⁹⁵

2.2.8 Retailers and Distributors

Distributors and retailers are an important link in the music industry as they facilitate the purchase of music by end users. This could be done through retail shops, as well as via the Internet. They stock CDs, VCDs, music cassettes as well as old vinyl discs. The Internet is currently being used to sell and distribute music through websites such as Ebay and Amazon as well as through downloads like iTunes. According to Mr. Aziz Dieng, the distributors and retailers have to keep up with modern forms of delivery such as the Internet to cater for consumers who have access to digital technologies both within and outside the continent. Ms Sibongile Khumalo, a prominent musician in South Africa pointed out that some retailers have opted to sell hard copies through the Internet while others are exploring possibilities of selling digital copies online.⁹⁶

⁹⁵ The copyright offices, collective management organisation (CMOs) and rights holders organisations in Kenya, Nigeria, Senegal and South Africa have been involved in publicity campaigns and awareness workshops for rights holders as well as users. The Music Copyright Society of Kenya for instance has been having a series of publicity campaigns between March and July 2008.

⁹⁶ Interview with Ms. Sibongile Khumalo, Johannesburg, South Africa in November 2005.

The distributors and retailers are expected to acquire legitimate copies from rights holders such as record companies.⁹⁷ In Kenya, the Music Copyright Society of Kenya (MCSK) got into an agreement with “My Orchard” an online distribution company to distribute the music on behalf of its members. However, the Kenya Association of Music Producers (KAMP) and other rights holders were opposed to the agreement. They were of the opinion that MCSK had overstepped its mandate and should have consulted the producers of sound recordings who had the distribution rights. Ms. Julie Gill, the Secretary to KAMP expressed her reservation on the distribution agreement and questioned its legality.⁹⁸ The distributors and retailers have to embrace technological changes. Online distribution creates loopholes for the unauthorised commercial use of music unless the relevant measures are taken.

2.2.9. Copyright Institutions.

Copyright institutions especially the collective management organisations (CMOs) are an integral part of the music industry. Through the CMOs, the rights holders are able to collect royalties from users such as the broadcasting stations and the entertainment venues. There are two types of CMOs that currently operate in Africa. One is the government controlled CMO found in French speaking countries such as Senegal, (BSDA) Mali, (BMDA) Benin (BURIDA). The second type are private organisations found in English speaking countries such as Music Copyright Society of Kenya (MCSK), the Collecting Society of Ghana (COSGA), the Zimbabwe Music Rights Association (ZIMRA) and the South Africa Music Rights Organisation (SAMRO). The Copyright Society of Malawi (COSOMA) was created as a statutory body that

⁹⁷ These include supermarkets, specialised music shops, regional and international distributors as well as private stores.

⁹⁸ Interview with the General Manager of the Music Copyright Society of Kenya (MCSK) and Miss Julie Gill of KAMP in January 2006. The issue has yet to be resolved.

acts as both the collecting society as well as the copyright office and is now an autonomous body.⁹⁹

The societies collect and distribute royalties to their respective members, which is a source of income for the artists. Unfortunately, quite a number of societies have been plagued with controversies and mismanagement. This creates a problem, as it affects the collection and distribution of royalties.¹⁰⁰ It should be noted that CMOs also collect and distribute royalties on behalf of performers, record companies and music publishers.

In most African countries, CMOs have concentrated on the rights of authors and composers and there are few countries that have other types of CMOs. Kenya, South Africa and Zimbabwe are some of the few countries in the region that have CMOs that deal with other rights.¹⁰¹

In South Africa, other CMOs are SARAAL that collects the mechanical rights and RISA that is mandated to collect royalties on behalf of the producers of sound recordings and performers. The role of CMOs in enforcement of music copyright will be discussed at length in paragraph 5.6.1.

⁹⁹ For more information on the various societies see COSOMA, <http://www.cosoma.org>, BSDA www.wipo.org/about-ip/en/ipworldwide/pdf/sn.pdf, MCSK, <http://www.mcsk.or.ke>, SAMRO <http://www.samro.org.za>.

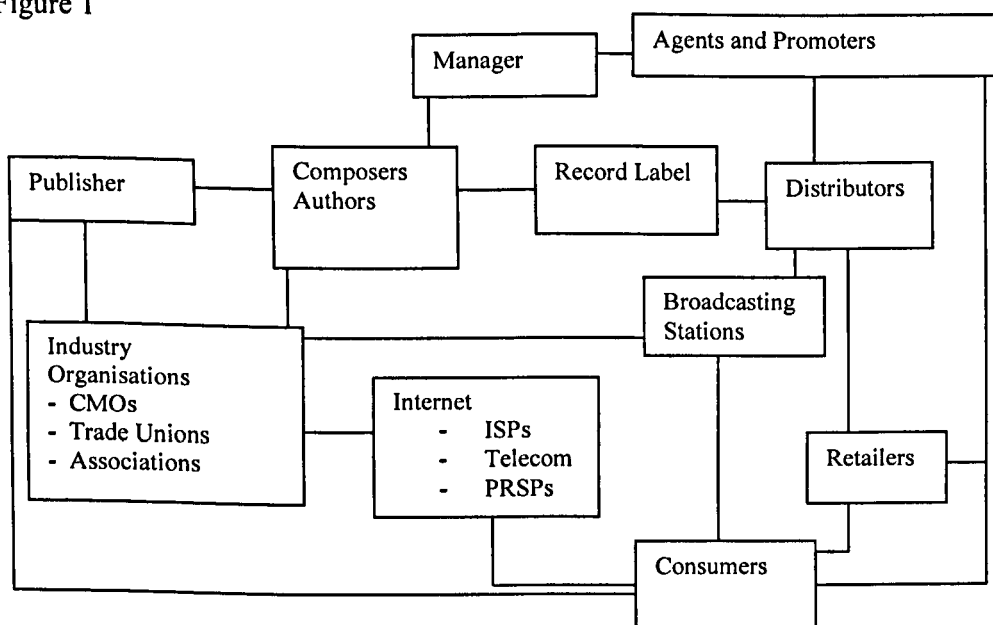
¹⁰⁰ MCSK has in the recent past tried to clear its image but the opposition from other parties has made the collection and distribution of royalties almost impossible. In Ghana, there was a tussle between the Copyright Office and the Musician's Union of Ghana over the control of the collecting society while in Nigeria; the Music Copyright Society of Nigeria took the government to court over administrative issues.

¹⁰¹ RISA in South Africa and KAMP in Kenya are examples of producers' organisations that are also mandated to collectively administer the performing rights that accrue to their members.

Other institutions within the music industry are music associations that deal with rights and interests of rights holders such as trade unions, which shall be discussed, further in paragraph 5.6. as well as their role in the enforcement of copyright.

The diagram below gives a summary of the Stakeholders within the music industry.

Figure 1



2. 3. An Assessment of the Music Industry in Sub Saharan Africa

Few studies have been carried out in sub Saharan Africa on the Music Industry. The current statistics are mainly industry based. One of the most widely used sources of statistics is the International Federation of the Phonographic Industry (IFPI). Even IFPI has a problem in gathering statistics from the music industry in sub Saharan Africa.¹⁰² Over the past few years, they have tried to gather information from countries like Nigeria, South Africa and Ghana and until recently, Zimbabwe.¹⁰³

¹⁰² See Paragraph 1.5 above.

¹⁰³ See IFPI, "The Music Industry in Figures" 2003, 2004 and 2005 available at: <http://www.ifpi.org>. (Last accessed in 2006). However, these are likely to be biased and generally reflect the interests of IFPI.

There are however some recent studies namely in Senegal, South Africa, Ghana and Kenya¹⁰⁴. Worldwide sales of music globally were estimated as US\$ 40 billion annually with the so-called “World Music”¹⁰⁵ accounting for 1% of the total sales. African music makes up 50% of the “World Music”.

It is important to note that these figures are based on a limited number of African countries such as South Africa, Zimbabwe, Ghana and Kenya.¹⁰⁶ The figures do not take into account the music industry of over 30 other countries within the region. For instance, the DRC has a thriving music industry and their music is easily available in Europe as 90% of it is recorded then marketed in France.¹⁰⁷ It has been possible to get some statistics from the South African market mainly due to the presence of the multinational record companies from whom the figures can be obtained. There are several other organisations within the South African Music Industry that are in a position to provide figures in terms of sales and even estimate the level unauthorised

¹⁰⁴ In Kenya, the World Bank carried out a study on the Value Chain Analysis of the Music Industry in November 2004, the report is yet to be released. In Senegal, Andy C. Pratt of the Department of Economics, London School of Economics carried out a research for UNCTAD on the Music Industry in Senegal. In 1998 the then Department of Arts, Culture, Science and Technology Commissioned a Report on the South African Music Industry.

¹⁰⁵ The term “World Music” connotes the music that does not fall within the mainstream music such as Western pop, rock among others. It covers music from other parts of the world.

¹⁰⁶ These figures only account for the African music that has been sold to the mainstream music market in the west. There is a need for an in depth study and creation of a database for African Music.

¹⁰⁷ However, these figures are not reflected in the IFPI reports. The IFPI reports are limited in their scope as they are not represented in a sub Saharan Africa except in Nigeria.

commercial use of music.¹⁰⁸ According to industry reports, the music industry in Africa is estimated at approximately US \$1.25 billion annually.¹⁰⁹

Industry reports indicate that the sales value of legitimate music recordings from Africa amounted to US\$ 203m in 2000.¹¹⁰ At the moment due to availability of statistics, South Africa is deemed to be the largest and one of the most vibrant music markets in Africa. In 2000, the music industry in South Africa was valued at US\$ 150 million.¹¹¹

These statistics cannot therefore be said to be fully representative of the music sales in Africa.¹¹² The author noted at the beginning of the chapter that there are 54 countries in Africa most of which have vibrant music industries such as Ghana, Nigeria, the DRC, Senegal, Mali, Tanzania, among others. Statistics from these countries have not been available to enable more precise empirical studies in the region. The size of the market in terms of sales within the continent is limited to statistics from select countries.¹¹³ Nigeria for instance has the largest population in Africa and is home to the most advanced recording studios in Africa with the largest entertainment industry in the continent.

¹⁰⁸ These include the Recording Industry of South Africa (RISA), which represents recording companies in South Africa among others. In countries like Kenya, although there was an organisation, Kenya Association of Producers and Video-grams that was formed in 1976 to represent the producers of sound recordings and audio visual works, the local record companies and independents were unwilling to join the organisation. The organisation has been dormant for over 25 years. A new organisation Kenya Association of Music Producers (KAMP) was launched in 2003 but has yet to start its operations.

¹⁰⁹ World Bank reports on the African Music Industry June 2000.

¹¹⁰ Based on the figures from IFPI available at: <http://www.ifpi.org>. (Last accessed 2006).

¹¹¹ Based on IFPI reports See "Music Industry Anti Piracy Conference Convenes in Cape Town" can be accessed at: <http://www.ifpi.org/site-content/press/20011011.html>.

¹¹² The IFPI reports are based on three or four countries in Africa namely Zimbabwe, South Africa, Nigeria and sometimes Kenya. This is due to the non-availability of data from the countries both at the Government as well as industry level.

¹¹³ This could be an opportunity for further research.

Malawi, Ghana, and Senegal have empirical data regarding the sale of sound recordings in their respective jurisdictions. These figures are based on the sale of anti piracy security devices sold by copyright offices. Through the sales of the “banderol” in Senegal, the Copyright Office was able to get an indication of the annual sales of legitimate music cassettes in the country. In 2004, for instance, Senegal had sold over one million music cassettes based on the sale of the anti piracy security device.

According to the Copyright Office in Senegal, a popular artist may register sales of between 50 000-80 000 units per album. This is quite high in comparison to Kenya where the popular artists barely make the 10 000 mark in terms of legitimate sales yet pirated copies of their music are available everywhere including on the Internet.

Currently there is only one gospel artist who has managed to sell over 800 000 copies of her album.¹¹⁴ In 1999, Nigeria and Ghana respectively sold 12 million holograms and 6 million banderols.¹¹⁵ In the early late 1970s and early 1980s, Nigeria had a legitimate plant that had the capacity of more than 20 million units per year.¹¹⁶ South Africa may have the most organised market in sub Saharan Africa but is by no means the largest in the region.

In 2002 and 2003, the music sales in South Africa were as hereunder:

Table 1 Sales of Music in South Africa¹¹⁷

¹¹⁴ According to Tabu Osusa, the artist, Esther Wahome was able to achieve such high sales as her music was produced and marketed in the United Kingdom.

¹¹⁵ Information based on reports from BSDA, the NCC in Nigeria and the SADC Report, *op cit.* unfortunately, IFPI and other organisations such as the World Bank have not utilised this information that would clearly define the sales of music in Africa.

¹¹⁶ This included both vinyl and music cassettes.

¹¹⁷ Source RISA Annual report, Industry Statistics available at:
http://www.risa.org.za/risa.php?content=agm2004_industry_stats.

Year	Medium	International	Local	Total	Total sales
2002	MCs	1 217 000	4 225 000	5 442 000	
	CDs	7 740 000	3 045 000	10 785 000	16 227 000
2003	MCs	2 000 000	4 500 000	6 500 000	
	CDs	7 000 000	3 500 000	10 500 000	17 000 000

The above table gives a clear picture of South African music sales in relation to both local and international repertoire. Sale of local music is through both MCs and CDs but the consumers are shifting towards the CD format. International repertoire is predominantly sold on CD format. Overall it reflects the consumer preferences in the country. The figures above are based on the actual sales.

The author was able to obtain figures from the Copyright Society of Malawi that gave an indication of the sales of music, performance revenue as well as mechanical rights as indicated in Table 2 below.

Table 2 Music Industry in Figures Malawi¹¹⁸

Year	No of Albums sold.	Amount of Sales in US\$	Mechanical rights Revenue	Retail sales	Performance revenue
2005	2 000 000	1 789 549	143 163	357 909	515 390

In Kenya, since the industry is quite fragmented, getting the exact figures was not easy. The number of albums sold in a year was estimated at anything between 10 and

¹¹⁸ Figures as per communication with Mr. Rosario Kamanga. COSOMA.

32 million albums. Of this, between 3 to 9.6 million consists of local repertoire. More than 90% of the music sold in Kenya is unauthorised; this means that only 1m to 3.2million legitimate albums are sold in the country. It was not possible to get a breakdown of the sales from various authorised distributors and independent producers.

The exact figures as to how much African music is consumed outside the continent is currently not available. Industry estimates are based on the actual sales by the major record labels.¹¹⁹ The main markets for African music are the United States, the United Kingdom, Germany, France and Japan. In France, the African artists sell between 25 000 and 100 000 units of their albums.¹²⁰ The sale of music from Africa to in the world market has increased over the years.¹²¹

2.4. Challenges to the Music Industry

The music industry in Africa has developed into an industry that employs thousands of people either directly or indirectly. However, not many musicians have made it a career and have to rely on other means to support themselves.¹²² The growth and development of the music industry in Africa has not been without challenges. In the history of music in Africa, the author discussed various factors that contributed to the

¹¹⁹ This is definitely an area that requires further research.

¹²⁰ "Development of Markets for the Music Industry in the SADC Region" Document presented at the SADC Inter-Ministerial Conference on the place and role of culture in SADC Regional Integration Agenda. <http://www.teledata.mz/sadccult/pmark.htm>.

¹²¹ 'Development of Markets for the Music Industry in the SADC Region' Document presented at the SADC Inter-Ministerial Conference on the place and role of Culture in SADC Regional Integration Agenda, www.teledata.mz/sadccult/pmark.htm p. 5. Interviews with various artists in Kenya, Communication with Secretary General of the Musicians' Union of South Africa (MUSA) in February 2006, Communication with Aziz Dieng, President of the Musicians' Association in Senegal and the Chairperson of the Governing Board of BSDA, Senegal in July 2005.

¹²² In Senegal for instance, over eighty per cent of the musicians are either under employed or unemployed. See Frank J. Penna *et al.* (2003). *The Africa Music Project*. In Michael J. Finger and Philips Schuler. (eds.) *Poor People's Knowledge: Promoting IP in Developing Countries*. Oxford, Oxford University Press p. 96.

development of the music industry. The following paragraphs shall examine current challenges to the music industry in sub Saharan Africa.

2.4.1. Ignorance and Lack of Information

The author after discussions with various musicians, performers and record producers as well as law enforcement agencies found that ignorance compounded with lack of information among musicians is a serious problem that affected the music industry. One of the problems identified was the outright sale of rights by rights holders to third parties. This was attributed to the desire to make quick money without considering other options that would benefit the musician in the long run.

In South Africa, most musicians sell their music at a flat rate with no provision for royalties. A similar situation prevailed in Kenya, Senegal, Malawi, Uganda and Nigeria.¹²³ This problem was made worse by artists' relatively weak bargaining position. They also signed documents, the contents of which they did not understand nor the repercussions. As the contracts were legally binding, there was not much the artists could do to reverse the effects.

Artists try to produce as many albums as possible and this in turn compromises the standards of music produced. In extreme cases, artists sell their rights to several producers creating confusion as to ownership. This was the situation that prevailed in Kenya prior to 2000.¹²⁴ It was exacerbated by lack of written contracts between

¹²³ See Cultural Industries Growth Strategy: The South African Music Industry Final Report to the Department of Arts, Culture, Science and Technology, November 1998 p. 59. Available at: <http://www.doc.gov.za/reports/music-pub-film-craft/musfin 1.doc>.

¹²⁴ The MCSK Administrator further compounded the problem. He advised his members that copyright cannot be sold and that they should go and reclaim their rights from the producers. This as will be discussed in Chapter 4 does affect the societal perceptions of music copyright and thus enforcement.

creators and third parties thereby encouraging unauthorised copying, sale and distribution of the musical works.¹²⁵

The Musicians' Union of Ghana (MUSIGA) advised its members to ensure that they signed written contracts whenever called upon to perform or record music. Mr. O. Lebogo, the Secretary General of the then Musicians' Union of South Africa also said that due to continuous awareness programmes, most of its members insist on written contracts.

Respondents also noted that there are very few lawyers, judges, law enforcement agencies and even lecturers who have specialised in the field of copyright and related rights in most of the countries in the region. This, as the author shall illustrate later in Chapter 6, affects the administration and enforcement of copyright.¹²⁶ In some countries, persons appointed as copyright administrators have limited or no expertise in the area of copyright and in a few cases they undertake to learn on the job.

2.4.2. Availability of Funds and Resources

Another challenge relates to availability of funds and resources for the musicians together with those in the music industry. Banks are not very amiable to lending money to those involved in the music industry. This is because banks require collateral, which most artists do not have. In many cases, artists, have to rely on record companies and publishers to record and promote their music. Independent producers who have to raise their own capital to for their business venture are also

¹²⁵ The Copyright Office and the new administration at MCSK undertook various sensitisation efforts such as seminars and workshops. Section 33(3) of the Copyright Act of 2001 made it mandatory for copyright licenses and assignments to be in written form.

¹²⁶ See Paragraph 6.7.2.

affected.¹²⁷ The situation is compounded by high taxes on musical instruments and recording equipment, which in several countries are taxed in the same category as luxury goods.¹²⁸ As a result the inability of producers to raise capital for their ventures has a negative impact on the music industry.¹²⁹ Pirates take advantage of these situations especially in the supply of music that is in demand. Enforcement of copyright is affected by both technological and economic factors as will be discussed in paragraph 4.2.4.

2.4.3. Government Policy

Government policy in the area of copyright in general is wanting. In Kenya, the government only recently drafted the cultural policy and an Intellectual Property policy, which are yet to be adopted. Nigeria has a cultural policy that is enshrined in the Constitution but the policy has not been implemented especially in the area of music.¹³⁰ Governments do not seem to recognise the importance of the music industry and its contribution to social, economic and cultural development of the country.

Most countries do not have clear policies on copyright and Intellectual Property in general. The institutional structures were reminiscent of the colonial era and enforcement of copyright was not prioritised. This was reflected in the laws dealing

¹²⁷ Valuation of Intellectual Property especially copyright has yet to be done in most African countries.

¹²⁸ In Kenya, music equipment attracts a tax of over 50% while in Ghana at one point the tax was 160% on band instruments.

¹²⁹ See 4.2.5 on the impact of the prevailing economic conditions on the enforcement of copyright in the music industry.

¹³⁰ Nzewi O'Dyke. (2003). "The Effects of Globalisation in the Nigerian Music Scene." For the Many Musics Project of the International Music Council available at: www.mca.org.au/pdf/mmrefinal.pdf (Last Accessed May 2006).

with copyright, which for a long time were ignored.¹³¹ The development of case law in intellectual property and particularly music copyright has been very slow.

Lack of clear policies on copyright, as will be examined in paragraph 4.2, is one of the factors that affect copyright enforcement.

In the French speaking territories like Senegal, there was policy to move away from traditional music to the French forms of music. Through the assimilation policy, the French sought to make their subjects within the colonies *as French as possible*. This encouraged the importation of French styles, which were viewed to be more palatable than the existing traditional music.¹³²

Copyright offices in the region fall under various ministries. In countries like Nigeria and Ghana, the copyright offices fall under the Ministry of Culture while in South Africa, the Copyright office is under the Ministry of Trade. In countries like Kenya and Uganda, the copyright office falls under the office of the Attorney General. There are countries that have the copyright office within the Ministry of Information, as is the case in Namibia. The author notes that these countries do not have substantive policy documents to deal with copyright and other intellectual property rights.

The resulting policy is a combination of existing legislation, international treaties and official documents prepared by various ministries.¹³³ To a certain extent this may be true but the underlying problem is the level at which copyright is placed within the Governments' list of priorities.

¹³¹ This aspect is discussed in greater detail in paragraph 3.3.

¹³² Andy C. Pratt (2004) *supra*, footnote 27.

¹³³ M. Leesti and T. Pengelly. (2002). "Institutional Issues for developing Countries in Intellectual Property Policy Making, Administration and enforcement". Study Paper 9 for the Commission on Intellectual Property Rights Report p. 21.

In paragraph 4.2.2, the legal and institutional framework will be examined in detail in relation to effective enforcement of music copyright. A clear enforcement policy will go a long way in ensuring effective enforcement of copyright.

There are other government policies that have a negative impact on the music industry. This includes high taxes on recording equipment, which are normally classed as luxury goods. They inevitably attract taxes of between 100% and 160%.¹³⁴

There is a need to for the creation and adoption of a clear government policy on enforcement of copyright and related rights.

A good policy as will be discussed in paragraph 4.5 and Chapter 7 is likely to provide a strong basis for administrative and enforcement mechanisms. It should seek to achieve an efficient level of compliance to the law and enforcement of the rights provided for by the law. The policy should incorporate the minimum standards of protection.

2.4.4. Ineffective Administrative Structures

Administrative structures required for effective management and enforcement of copyright and related rights are lacking in several jurisdictions in sub Saharan Africa. Countries like Senegal, Nigeria, Malawi and Ghana all have copyright offices. Copyright offices, as will be critically examined in Paragraph 5.1 have a role to play in effective enforcement of copyright.

¹³⁴ In Ghana for instance, band instruments are classified as luxury goods even though they are necessary for artists. See Collins, J. (2001) *Making Ghanaian Music Exportable* Music Awards Paper presented at National Theatre, Accra, Ghana.

At the moment, there are very few countries that have successful collective management of copyright in the music industry.¹³⁵ These societies play an important role in the administration of authors' rights.

Users take advantage of problems that plague the collective management societies to avoid paying royalties.¹³⁶ Radio stations, especially FM stations rely heavily on music to survive. However, apart from South Africa, Malawi and Senegal, royalty payment from radio stations and other users is not automatic. Most users and radio stations take advantage of existing problems within CMOs and refuse to pay royalties claiming that they are not sure that the royalties collected would be remitted to the rights holders.¹³⁷

Although the law is clear on rights it does not make specific provisions for collection and distribution of royalties.¹³⁸ Unauthorised commercial use of music by broadcasting stations as well as other users such as hotels and recreational facilities clearly amounts to a violation of copyright in the music industry. Enforcement is clearly lacking in this area. This has something to do with societal attitudes that will be examined in paragraph 4.2.3.

There is a remarkable lack of co-ordination among various structures within the music industry. Although the South African market may be said to be the most organised in sub Saharan Africa, this is still an issue.

¹³⁵ South Africa, Malawi, Botswana and Senegal to name a few.

¹³⁶ In 2002, Steadman and Associates estimated that the royalties due to the Music Copyright Society of Kenya (MCSK) was to the tune of KES 60 million (US \$ 769 230). Based on an interview with the General Manager of MCSK September 2001.

¹³⁷ See paragraph 5.6.1.

¹³⁸ For further reading see Sybille E. Schlater. (2005). Copyright Collecting Societies in Developing Countries: Possibilities and Dangers, In Heath, C. and Sanders, A. K. (eds.) *New Frontiers of Intellectual Property Law; IP and Cultural Heritage, Geographical Indications, Enforcement and Overprotection* Vol. 25 Oxford, Hart Publishers pp. 54-69.

There have been attempts by industry players to coordinate the efforts especially in relation to enforcement as will be discussed in paragraph 5.6.1 and 5.6.2.¹³⁹

2.5. An Assessment of Unauthorised Commercial Use of Music in Sub Saharan Africa

“Music piracy in Africa constitutes today the biggest obstacle to the development of the cultural institutions linked to music. Whether it is a small domestic operation or on an industrial scale, piracy remains a dangerous threat to the economic and social development of artists. It is a systematic theft carried out against the heritage of the creators and professionals who work in music.”

Youssou N'Dour, Senegal.

2.5.1. The Notion of Piracy from an Industry Perspective

The above-mentioned quote refers to a commonly used terminology in the music industry. The analysis, in this thesis, of unauthorised commercial use in sub Saharan Africa includes rhetorical and industry terms such as piracy, counterfeiting, bootlegging, among others. It is important to realise that such industry terminology in actuality describes specific types of unauthorised commercial use.¹⁴⁰

(a) Piracy

Piracy is a term used by the music industry to connote any negative activity. It can refer to the manufacture, distribution and sale of recorded music that has been made

¹³⁹ See Paragraph 5.6.1 and 5.6.2.

¹⁴⁰ See IFPI ‘What is Piracy’ available at:
http://www.ifpi.org/site-content/antipiracy/what_is_piracy.html.

without the authority of the rights holder. These goods are intended to appear similar to the original.¹⁴¹

It constitutes unauthorised commercial reproduction, distribution by way of sale or hire and importation of recorded music. In a criminal context, it refers to illegal activities which centre on the illegal reproduction, importation and sale of recorded music. Manufacturers, distributors, sellers and importers of these illegal goods often evade taxes, do not compensate rights holders and try to make maximum profits at minimal costs.¹⁴² Persons engaged in this activity are not overly concerned about the quality and appearance of the illegal copy. They try to achieve the maximum profit on minimum investment. This form of piracy is common with compilation albums which contain several hit songs.¹⁴³ This is a big problem in the music industry in sub Saharan.¹⁴⁴

(b) Counterfeiting

The music industry use this term to refer specifically to acts which involve commercial copying of recorded music and is intended to deceive the consumer that they are buying legitimate copies. Third parties try to duplicate the album art as well as the various logos that are incorporated into the original work.¹⁴⁵

¹⁴¹ Michael Blackney, (2006) "The Phenomenon of Counterfeiting and Piracy in the European Union: Factual Overview and Legal and Institutional Framework." In Olivier Vrins And Marius Schenider (eds) *Enforcement of Intellectual Property Rights through Border Measures; Law and Practice in the EU*, Libreria Ledi, Milan p. 4.

¹⁴² *Ibid.*

¹⁴³ *Ibid.*

¹⁴⁴ For an in-depth analysis of piracy and counterfeiting see Bernard Sihanya. (1999), *Intellectual Property Confronts Counterfeiting in Africa: Protecting Innovators and Consumers in the Cyber Society*, in T. Wihemsson. *et al* (eds). *Consumer Law in the Information Society* Kluwer: London. pp. 329-367.

¹⁴⁵ *Ibid.*

However, since they are propelled by the desire to obtain maximum profits at minimal investment, the quality of the sound recording or the artwork might be compromised.¹⁴⁶

(c) Bootlegging

The music industry use this term to refer specifically to acts which involve clandestine recording of a live performance, a radio or television broadcast or the reproduction of a sound recording that has yet to be released.¹⁴⁷ These are normally obtained from live performances or broadcasts. It is common especially in developing countries where music is broadcast or performed live before the official release by record companies.¹⁴⁸ The pirates take advantage of this loophole to supply the product to the market.

(d) Unauthorised copying

This term as used by the music industry refers to commercial unauthorised reproduction of sound recordings by a third party is another form of piracy. It takes place where the person authorised to reproduce the legitimate copies makes extra copies without authorisation by the rights holder. It is common in situations where legitimate rights holders engage the services of a manufacturer situated in a country where copyright laws are lax. These copies are exactly the same as the legitimate copies and they pose a major problem especially in enforcement.¹⁴⁹

¹⁴⁶ Counterfeiting here is different from counterfeiting with regard to trademarks.

¹⁴⁷ Taylor Martin. (1993). The Nature of the Infringement Problem in the Audio Fixation Industry *E.I.P.R.* 1993, 15 (7) 255-259.

¹⁴⁸ See the Case of *EMI Records Ltd and Others v. The CD Specialists Ltd* (1992) FSR 70.

¹⁴⁹ A recent example occurred in Kenya in 2001 where *Ogopa DJs*, a local label, engaged the services of a manufacturing plant in Pakistan. The manufacturer produced extra unauthorised copies that were exported to Kenya.

From the above industry definitions, it is clear that piracy inevitably involves unauthorised commercial reproduction and distribution of recorded music. Piracy is a form of copyright infringement with a commercial angle. As will be discussed in paragraph 3.3.5, piracy amounts to infringement of copyright but not all copyright infringement amounts to piracy.

2.5.2. The Internet

There are few provisions within the current copyright laws in this region which deal specifically with digital issues. Moreover, there has been very little discussion in the sub Saharan region in relation to unauthorised commercial use in the digital context. This may be attributable to limited internet access as well as lack of computing facilities in most households as compared to developed regions. Nevertheless, one is cognisant of the fact that there are several issues in relation to enforcement in the digital environment, and it is prudent to highlight in this sub-section the forthcoming potential issues that will arise in the near future, especially with the introduction of the fibre optic cable that will increase internet bandwidth.¹⁵⁰

By using modern technology, music can be compressed, and disseminated using the digital platform. This may not involve making of physical copies but allows users to access music without paying for it. It also facilitates other forms of unauthorised use

¹⁵⁰ It is submitted that a comprehensive discussion of Internet issues is beyond the scope of this thesis which is limited to the issue of institutional framework of enforcement in relation music copyright at the current time in this region. It is hoped that some of the recommendations made within this thesis will, in time, be applicable in the digital context.

such as illegal file sharing; illegal downloads as well unauthorised commercial use such as illegal distribution of music.¹⁵¹

Illegal file sharing involves making available and downloading music files without the permission of the rights holders. There are internet sites that offer illegal downloads at a fee or free to users though most of them are based outside the region.

Unauthorised use over the Internet may also be non-commercial with the users simply downloading and storing the music for their own personal use; this will become an issue as the level of disposable income within this region increases slowly to allow more consumption of items such as iPods and mobile phones.

The Internet has to a certain extent contributed to the growing cases of unauthorised commercial use of music. It is a fact that due to the rather slow development of information technology, the ownership and use of computers and connectivity is still limited.¹⁵² The establishment of cyber cafes in urban centres has slowly increased the incidences of illegal downloading of music, which would subsequently be reproduced and distributed by local distributors without the rights holders' authority. It works out better for them as they do not have to deal with the border controls and the returns are much higher.¹⁵³

¹⁵¹ Third parties can make a compilation of up to 150 songs on the MP3 format and sell to the consumers who are often willing to pay less for more.

¹⁵² In 2005, South Africa had 3.6million Internet users, which is less than 10% of the total population while Kenya had 1.5 million Internet users about 8% of the total population and in Nigeria only 1.7 million, less than 2% of the total population had access to the Internet in 2005.

¹⁵³ One CD could have up to 150 tracks.

The Internet has also introduced the sale of unauthorised music over the Internet. The target market includes those living abroad who would like to have local music, which may not be available in markets outside the continent. Those who are worst affected are the artists whose music has been released in digital format.

2.5.3 Causes of Unauthorised Commercial Use

The main cause of unauthorised commercial use is the promise of high profits by unscrupulous “businesses” free riding on the creative efforts and investments of rights holders.

The author contends that there are several reasons for this.

First, the unauthorised party does not incur the initial costs of production that are normally incurred by the record companies; they simply reproduce the finished work.

Second, unauthorised parties will ride on the success of existing music; they are more likely to target music that is in high demand. Third, the unauthorised party gets to keep all proceeds of the sales as they will not remit any royalties to artists or publishers and neither will they pay taxes. Fourth, the criminal sanctions are neither punitive nor deterrent while damages awarded by courts are negligible. The civil remedies are difficult to obtain and do not compensate the rights holders for the losses incurred or damages suffered¹⁵⁴ Fifth is failure by the consuming public to recognise piracy illegal and attracts both civil and criminal sanctions.¹⁵⁵

Printing of music CDs outside the country for locally produced music also provides the opportunity for third parties to bring in unauthorised copies of music from the

¹⁵⁴ See paragraph 4.3.2 and 6.6 below.

¹⁵⁵ See paragraph 4.3.2 and Chapter 6 below.

same printing plants that printed the legitimate music.¹⁵⁶ In 2002, a local record label in Kenya, *Ogopa* placed an order for 2 000 copies of its *Ogopa* debut album which was a compilation of various artists, from a printing firm in Pakistan. Barely two weeks after the legitimate copies arrived, Customs officials in Nairobi intercepted a consignment of 10 000 *Ogopa* CDs. On contacting the rights holder, Customs were informed that they were unauthorised copies. The rights holder had underestimated the demand for the CDs and the pirates decided to cash in, as the market was available.¹⁵⁷

Some measures taken by the Government can be counterproductive and contribute to the problem of unauthorised commercial use. In 1989, the Kenyan Government introduced the blank tape levy as well as increased import duty for music cassettes.¹⁵⁸ The move was meant to help the music business but instead encouraged cross border piracy since the price of blank tapes from Tanzania and Uganda was lower and pirates simply shifted their operations to Uganda and Tanzania. In some cases, there is a discrepancy between statutory provisions and what happens in practice. It creates a loophole for the users and other parties keen to capitalise on the commercial exploitation of the protected works.¹⁵⁹ There are instances where the law is present but simply not enforced as a whole or in part.¹⁶⁰

¹⁵⁶ See Paragraph 2.2.8 above.

¹⁵⁷ Document is available at the Kenya Copyright Board Offices.

¹⁵⁸ See Section 28 Copyright Act No. 12 of 2001.

¹⁵⁹ In Senegal for instance, Article 53 of the 1973 Copyright Act requires the radio stations to pay royalties to the collective management societies for the music that they play. For a long time this was not enforced and the music was played without the authors receiving any royalties for their performing rights. The head of the collecting society got a court order to shut down one of the radio stations and within two weeks, the rest of the radio stations were paying royalties to the collective management society. Based on a telephone interview with Frank J. Penna World Bank Consultant on Traditional Knowledge Industries on 26th July 2005.

¹⁶⁰ The Copyright Act of 2001, 9 Kenya) came into force on 1 February 2003.

In this context, Chapter 5 will examine the legal and institutional framework on enforcement.¹⁶¹

The intangible nature of copyright is such that unauthorised use does not necessarily divest the owner or copyright holder of his property but instead deprives him of earnings that would have accrued had he made and distributed the copies. This is due to the fact that copyright works are public goods, which means that they are non-rival and non-exclusive. Although the initial cost of producing the original is high, the cost of reproducing music is minimal. Unauthorised commercial use in the music industry is thus not seen to be a crime or illegal.¹⁶²

The author contends that lack of proper administrative and enforcement structures has contributed to the problem of piracy. The situation is made worse by the presence of un-informed enforcement agencies. Copyright offices have not dedicated much time in administration and enforcement of copyright. Other law enforcement agencies such as Police and Customs always claim that they lack direction from the Copyright office and are thus at loss as to how to proceed in these matters.

Private and industry organisations in several countries have played a minor role in the whole process and rely on the Government to spearhead the enforcement process.

¹⁶¹ The Copyright Act 2001 was passed in 2001 and only came into force in February 2003. It provides for the Kenya Copyright Board under Part II (to deal with the general administration of copyright and related rights in Kenya). It also provides for stronger enforcement mechanisms including the provision for inspectors and appointment of prosecutors to deal with copyright cases Part V. It also provides for tougher penalties for infringement of copyright and related rights Part IV. It is important to note that the Board was appointed for a period of three years, which period expires in July 2003 and there is nothing to show for the period it has been in existence. Although the Honourable Attorney General has constituted the Board, it has yet to commence operations. The Board has a central role in enforcement. In Uganda, the Copyright Act of 1964, though enacted, was never enforced. However, in 2006, The Ugandan Parliament passed a new law, which provides for specific administrative structures to ensure that the law is enacted.

¹⁶² See paragraph 4.2.3.

This is evident in countries like Ghana where the Copyright Office had to take the initiative to fight unauthorised commercial use before the industry could join in. In Kenya, musicians approached the Government and requested the copyright office to endorse their anti piracy activities as this would send a clear message to the illegal users.¹⁶³ They were of the opinion that people generally did not take music piracy seriously as there was no clear government policy.

The industry in South Africa already put measures in place to deal with unauthorised commercial use and has worked with the Government to deal with the issue. The handling of music copyright cases by the judiciary has also contributed to the problem.¹⁶⁴ High levels of corruption among the judicial officers and various establishments have a negative impact enforcement of most laws including copyright and related rights. This has been the case in various sub Saharan countries such as Kenya, where corruption in the Judiciary was phenomenal.¹⁶⁵ It was a major impediment to the enforcement of the rights of the music industry. Corruption also permeates to other administrative structures such as CMOs. In Mali for instance, the collective management society would collect some money from the Government and give it out to the musicians to keep them quiet.

¹⁶³ Based on interviews with various recording artists in Kenya in July 2005.

¹⁶⁴ This will be discussed in greater detail in paragraph 6.7.

¹⁶⁵ In 1998, the Kenyan Government appointed a task force chaired by court of Appeal Judge Justice Richard Otieno Kwach to look into the performance allegations of corruption and operational problems of the Judiciary among other things. The Kwach Report was submitted to the Government and debated upon. In June 2003 Justice Aaron Ringera's Report made similar findings of massive corruption. A Commonwealth report on the same revealed high levels of corruption within the Kenyan Judiciary. In 2003, the Ringera Report came up with similar findings and it is through this report that over 23 Judges and 73 Magistrates were retired in the public interest. There were those who opted to face the tribunal established to investigate their conduct and so far one Judge has been reinstated after being cleared by the Tribunal.

In Kenya, prior to 2000, the collective management society registered unqualified people who would be paid royalties while the genuine members got very little. The matter was made worse by payment of royalties to fictitious members. The then administrator and some board members would ask the users to pay them some amount of money in lieu of royalties. They also collaborated with the pirates as well as the police and infringing copies would conveniently disappear from police stations.¹⁶⁶ Customs officials are also deeply involved in corruption, which creates a problem hampering effective enforcement at the various points of entry.¹⁶⁷

There were two main technological changes that exacerbated the problem of unauthorised commercial use as discussed above: the advent of the music cassette and digital technologies. This was well articulated by Gabriel Omolo, a veteran musician from Kenya, who expressed the following during a recent interview:

“I foresaw the lack of a future in the music industry in Kenya in the early 1980s when piracy started taking root...the emergence of recorded cassettes did us in terribly....We used to record on santuri (record players), which kept piracy in check...emergence led to the closure of Equator Studios.”¹⁶⁸

Advances in technology enabled inexpensive reproduction and distribution of copyright works. These works are available at a relatively low price. Technology has also contributed to higher levels of unauthorised commercial use due to high costs of

¹⁶⁶ Information was obtained from the copyright office in Kenya.

¹⁶⁷ See paragraph 5.4 below.

¹⁶⁸ Harold Ayodo. (2006) “Gabriel Omolo: *Sasa ni Lunch time*”. The East African Standard, 13 May 2006 available at: http://eandard.net/mag/mag_php?d=1143952425&catid=299.

production and in some countries, recording facilities that are available to artists are of low quality as they use direct recording.¹⁶⁹

For developing countries like Kenya and Nigeria, Video Compact Discs (VCDs) provide cheaper alternatives as VCD machines are cheaper as well as more readily available to consumers than computers or CD players. In the current market, a legitimate CD retails at between Ksh 800 (US\$11) and Ksh 1600 (US\$22) in Kenya. Illegal copies sell for as little as US\$ 1.40. The cost of an illegal is as little as US\$2. To some extent this, coupled with other factors discussed in this thesis contributes enforcement especially in developing countries.¹⁷⁰

Ignorance on the part of rights holders especially authors and composers was seen to be one of the contributing factors to increased unauthorised use of music. This was the case in Nigeria where rights holders believed that distribution of unauthorised music was good for their careers as it helped them get to a wider audience and thus increase their popularity.¹⁷¹

¹⁶⁹ There are three options available to the artists after they have recorded or mastered a recording. One is the professional mastering where the digital recording is made and "stamper" created and subsequently used to duplicate CDs. These facilities are found in Senegal, Nigeria, South Africa and Tanzania. This is quite an expensive process, which several artists cannot afford unless a record company or publisher backs them. The second option is a standard mastering process where an analogue copy of the work is made on a CD or a tape in a recording studio and then taken to a duplication plant. This is the most common way used for producing music in Kenya and Ghana. The third is the cheapest method, which involves direct recording of the work from a studio recording to a master. It compromises on quality and is what is available among most of the local artists. For further reading see "Integrated Value Chain Analysis of Kenya's Music Industry: Critical Challenges and Opportunities" Report Prepared for the World Bank by Global Development Solutions, LLC December 2004. See also paragraph 2.2.4 above.

¹⁷⁰ The cost of producing music is high in relation to the average income of the population in Africa. Users view illegal copies as a cheaper alternative to legitimate copies. See discussion paragraph 4.2.3.

¹⁷¹ Richard Letts 'Effects of Globalisation on Music in the Contrasting Countries: Australia, Germany, Nigeria, the Philippines and Uruguay' Report of a research Project for the Many Musics program of the International Music Council October 2003 available at: <http://www.mca.org.au/pdf/mmresfinal.pdf>.

The underlying issue is the unauthorised exercise by third parties of exclusive rights granted to the copyright owner.¹⁷²

2.5.4. Cost to Industry

Unauthorised use of music costs the industry billions of dollars every year according to the industry reports. In 2004, global sales of illegal music were estimated at 1.5 billion units worth US\$ 4.6 billion.¹⁷³ The figure is based on estimates by the music industry, as it is difficult to tell the exact sales, as records sales would be unavailable considering that it is an illegal activity.¹⁷⁴ The music industry in South Africa estimates that for every original copy of music, there must be at least three unauthorised copies for distribution.¹⁷⁵

In sub Saharan Africa, however, like the rest of the world, there is a shift from MC to CD piracy. This is because the CDs are easier and cheaper to reproduce and can be done practically anywhere.¹⁷⁶ The cost of CD-Rs and players is decreasing drastically

¹⁷² See Paragraph 3.3.5.

¹⁷³ IFPI Commercial Piracy Report 2006, available online at: <http://www.ifpi.org/content/library/piracy-report.pdf>. The industry organisations use estimates. It would be advisable to involve the consumer groups, as they are more likely to come up with more accurate figures.

¹⁷⁴ As stated in paragraph 1.5.1, data on the music industry in sub Saharan Africa is limited to the few industry reports such as those from the IFPI, RISA and SAMRO. There are no government or independent reports on the music industry. It is notable however that Kenya and South Africa have recently commissioned studies on the economic contribution of copyright industries to the economy. The studies are underway and Kenya is due to have the report ready by November 2008.

¹⁷⁵ See Keeran Sewsunker. "Cars searched in CD piracy crackdown" Daily News 21 May 2004 available online at: <http://www.iol.co.za>.

¹⁷⁶ Following raids carried out by IFPI in Taiwan, Russia, Malaysia and Indonesia, most illegal operations uncovered use of CD pressing plants which can easily be dismantled and removed when the owners become aware of an impending raid.

making it more available to users in the sub continent.¹⁷⁷ There are currently over 40 disc replication lines operating in Nigeria, Senegal and South Africa.¹⁷⁸

In developing countries like Kenya and Nigeria, the illegal distributors operate from inconspicuous premises usually located in business centres. In 2004, a raid was carried out on a suspected illegal plant in Lagos Nigeria. 25 illegal stampers were found and 1 million discs seized.¹⁷⁹ This gives a new dimension to unauthorised commercial use in sub Saharan Africa where it has always been assumed that the illegal products come from outside the continent.¹⁸⁰

Getting statistics on unauthorised commercial use of music in sub Saharan Africa is difficult due to various factors. First, as was discussed above, a centralised music industry is lacking in most of sub Saharan Africa. The industry appears to be fragmented and without a centralised agency that would collect and keep information on activities within the industry or keep track of the unauthorised reproduction, sale and distribution of recorded music.

Secondly, as major record companies have either pulled out or refused to invest in these markets, there is no pressure to monitor the industry, which in any case is a small fraction of what is considered the world music market.

¹⁷⁷ See Howard Donaldson. (2005) "Pirates of the 21st Century" Sunday Tribune 16 October 2005 p. 10 available at <http://www.iol.co.za>.

¹⁷⁸ IFPI Commercial Piracy Report 2006, Available online at: <http://www.ifpi.org/content/library/piracy-report.pdf>

¹⁷⁹ *Ibid.*

¹⁸⁰ According to a report by the Head of the Enforcement Unit of the Kenya Copyright Board on the Study Tour to Nigeria July 2008, there are more than 8 optical disc plants in Nigeria that have been identified by the Nigerian Copyright Commission. These are used to manufacture illegal copies of music CDs and DVDs which subsequently find their way into the market. (The report is on file with the author and at the Kenya Copyright Board Offices in Nairobi.)

So losses incurred by the “big five” would be negligible.¹⁸¹ In any case, the reasoning is that they would not have invested in the market in the first place so the losses would be hypothetical.¹⁸²

It takes into account the purchasing power of a majority of the population in several African countries and how much they would be willing to spend on music.¹⁸³ The author contends that with ongoing studies on the economic contribution of copyright industries in countries like Kenya and South Africa, official statistics on the music industry in general will be available.

In Kenya, the local industry estimates illegal sales of music to be between 9 million and 28.8 million annually.¹⁸⁴ The legitimate market hardly exists.¹⁸⁵ Based on a study in Kenya the estimated loss of retail sales as a result of pirated music sales range from Ksh1.28 billion to 4.75 billion (approximately US\$ 15.9 to \$59.4 million) per annum.¹⁸⁶

¹⁸¹ See paragraph.

¹⁸² It is interesting to note that although the music industry is considered small especially for the record companies, this has not stopped the USTR from mentioning several countries in Africa under the Special 301 watch list. This is done for allegedly failure, on the part of the countries in Africa to enforce their laws.

¹⁸³ A casual survey of ten people in Nairobi revealed a very interesting fact. Of the ten people questioned, only one would consider buying music on regular basis and three would buy an original CD if they really liked it. The other six did not own any original music and the music that they had consisted of copies that they had bought which were illegal and others that they copied from friends. The survey was carried out in May 2005 in Nairobi. The group picked of the survey consisted of 10 individuals randomly picked from middle-income earners.

¹⁸⁴ Based on figures by Global Development Solutions 2004. The company carried out a research for the Value Chain Analysis for the World Bank. (The World Bank had not officially released the report as per January 2007).

¹⁸⁵ Based on diverse communication with Ms Jennifer Shamalla, the General Manager of MCSK in February 2006 and Ms. Julie Gill of AI Records, February 2006.

¹⁸⁶ World Bank Report. *supra*, footnote 174.

It is estimated that cost of illegal sales in the music industry in Nigeria over US\$ 50 million in 2004 only.¹⁸⁷ This has become a multi-million industry in sub Saharan Africa. South Africa, which has the most organised industry in the region, has illegal sales of between 40-45%.¹⁸⁸

Table 3 Estimates of Illegal Music Sales in South Africa¹⁸⁹

Year	Medium	International	Local	Total	Percentage
2003	MCs	548 000	1 901 000	2 449 000	45%
	CDs	3 096 000	1 218 000	4 314 000	40%

These figures are high in comparison to those in the developed economies such as the US, the UK and Japan.¹⁹⁰ The reasons for high levels of unauthorised commercial use, the author contends, can be traced to the lack or limited enforcement which is influenced by various factors. These include technology, government policies on music, and the societal attitudes towards the laws that have been put in place, as well as the knowledge and attitude of the users.¹⁹¹

¹⁸⁷ Taryn-Lee Bigger (2005). 'Nigerian Copyright Commission fighting piracy with hologram security device' published on 7 April 2005 available at: <http://www.mio.za>.

¹⁸⁸ RISA Chairman's Anti Piracy Report http://www.risa.org.za/risa.php?content=agm2003_antipiracy.

¹⁸⁹ *Ibid.*

¹⁹⁰ The United Kingdom has the second largest music industry in the world. It has one of the lowest levels of commercial piracy, which is estimated at 3.9%. It amounts to an annual loss of £ 76.9 million. This figure is higher than the approximated value of the music industry in various countries in Africa. There has been an increase in unauthorised commercial use of music in the UK due to various factors such as the entry of organised crime units into the market, the decreasing cost of reproduction facilities, lack of training within the law enforcement agencies and poor coordination between the law enforcement agencies. The massive returns from unauthorised commercial use and the relatively low risks are a catalyst. For more information see <http://www.bpi.co.uk>.

¹⁹¹ See paragraph 4.2.

(a) Senegal

According to the Mr. Aziz Dieng, unauthorised commercial use causes considerable losses to the music industry in Senegal. One of the main contributing factors is limited capacity of distribution of CDs or music tapes within the country and the neighbouring countries that largely affects new and popular music. Unauthorised reproduction and distribution ensures the supply of music to the poor population in remote areas of the country. Third parties also take advantage of the gap in the distribution system to get the popular music to Senegalese citizens abroad. They have even gone a step further by selling unauthorised music to overseas consumers at exorbitant prices as the overseas consumers.

In that way they end up controlling overseas market and getting more capital to inject into their business at home.¹⁹² Consequently, genuine investors are unwilling to invest in the music industry in Senegal. Although levels of unauthorised commercial use with regard to music cassettes have gone down, thanks to the anti piracy security device, illegal CDs continue to flood the market.¹⁹³

(b) Kenya

Just as in Senegal, unauthorised third parties in Kenya take advantage of the 'gap' to get to wider markets. In Kenya, unauthorised dealers took on the licensed distributors of audio and audiovisual works on grounds that they were being harassed. As far as they were concerned, there are no legitimate rights holders in Kenya, therefore the

¹⁹² See paragraph 2.2.8 Retailers and Distributors above.

¹⁹³ See paragraph 5.3 below.

market was free for all.¹⁹⁴ This is an example of the societal perceptions, as will be discussed in paragraph 4.2.3, which have a bearing on the level of enforcement. It also highlights the economic influence. There are instances where the rights holders release their music to the radio and television stations before releasing the album on CD or tape. Third parties make illegal copies and sale them to the public to cope with the demand.¹⁹⁵

2.6. Summary and Conclusion

The music industry in sub Saharan Africa, as discussed above, has been shaped by social, economic, political and technological factors. The continent has had to deal with the issue of unauthorised commercial use which is exacerbated by lack of or limited enforcement of copyright. Unauthorised commercial use has various economic and social effects. One is the loss of legitimate sales by the rights holder, which in turn reduces the revenue collected by the government in the form of taxes. It also translates to loss of earnings by the rights holders involved in legitimate production such as composers and songwriters as well as publishers as it affects the flow of royalties. As authors are not rewarded for their works, their creativity is likely to decline.¹⁹⁶

Illegal reproduction and sale of music affects the growth of the local industry, as markets are flooded with cheap pirated imports of mainly foreign repertoire.

¹⁹⁴ This was included in a supporting affidavit by the Chairman of the Kenya Audio Visual Traders Association. For further reading on music piracy see Ben Sihanya. *Constructing Copyright and Literary Creativity in Kenya, op cit*, p.152 –158.

¹⁹⁵ This was the situation in Kenya, Uganda and Tanzania especially in the late 1990s and the early part of this decade when there were new emerging artists and the renewed interest in local music.

¹⁹⁶ See Chapter 3 on rationale for copyright protection.

This stifles the local industry, as the consumers opt for pirated music that is cheaper. Local producers are hardly able to compete with cheap unauthorised imports.

It also discourages potential investors, both foreign and local from investing in an industry with high risks due to lack of enforcement.¹⁹⁷ One might argue that majority of those who purchase unauthorised music especially in developing countries would not otherwise have purchased the legitimate copies in the first place so the markets are different and the sale in one illegal copy does not necessarily translate to a loss of a legitimate sale. The jury is still out. However, one thing that is clear is that local as well as international artists are affected. The loss for international artists might be negligible as the market in sub Saharan Africa in relation to foreign repertoire is small but the effects are evident in the local industry.

From the foregoing, it is clear that piracy and unauthorised use of music is a major problem in the industry and can be attributed to lack or limited enforcement of copyright in the music industry. Effective enforcement is determined by various factors including modern technology, the prevailing institutional framework, as well as the social and economic set up. These influence enforcement of copyright and related rights as will be examined in greater detail in paragraph 4.2.

Most sub Saharan countries, as shall be discussed paragraph have modern copyright laws. What is clearly lacking is the effective enforcement of laws. Copyright laws as we shall see in the next chapter have been in place. The author shall examine the laws

¹⁹⁷ For further reading see Michael Blakeney. (2006) "The Phenomenon of Counterfeiting and Piracy in the European Union: Factual Overview and Legal and Institutional Framework" in, Oliver Vrms & Marius Schneider (eds.) *Enforcement of Intellectual Property Rights Through Border Measures Law and Practice in the EU* Oxford, Oxford University Press, p. 7-20.

and analyse the provisions on infringement in relation to unauthorised commercial use in the music industry.

CHAPTER 3. A CRITICAL ANALYSIS OF MUSIC COPYRIGHT IN SUB SAHARAN AFRICA

3.0 Introduction

Copyright protects the rights of authors in the music industry. This has over the years extended to cover related rights. Initially, national laws governed copyright but with time, an international regime on protection of copyright developed and set a minimum standard of protection. Copyright law, as will be discussed in this chapter is constantly developing in response to technological changes.

A close examination of the history of copyright in Africa indicates that it is a recent development. Its development was influenced by common law and civil law copyright systems in Europe. The copyright system developed under common law while the author's right system developed under civil law. The distinction between the two systems lies in their different philosophical foundations, which have a bearing on enforcement of the rights as will be discussed in paragraph 4.2.1.

Laws from colonial regimes such as France, the United Kingdom, Portugal and Spain shaped the current copyright system in sub Saharan Africa.¹ After independence, subsequent changes were made to the laws to conform to existing international regimes such as the Berne Convention.

¹ The Portuguese colonies in Africa included Angola, Mozambique and Cape Verde while the Spanish colonised Equatorial Guinea. France and the United Kingdom had the larger share of the colonies in Africa. Initially, national laws governed copyright but with the development of cross border trade, it was necessary to have an international regime setting the minimum standards of protection.

The laws then did not take into account the prevailing social, economic and political circumstances in the newly independent states. Recent amendments to copyright laws in sub Saharan Africa were made to ensure TRIPS compliance. Copyright law is constantly developing in response to new developments especially in technology.

The main purpose of this chapter is to give a critical analysis of the history and development of copyright in Africa especially in relation to enforcement of copyright in the music industry. The chapter will examine the doctrines underlying the two systems of copyright and how they affect its enforcement. It will also examine the development of music copyright in sub Saharan Africa and the effects of international law on music copyright and enforcement.²

3.1. Rationale for Copyright Protection

Copyright can be described as a “bundle” of exclusive rights granted by law to the author of literary, artistic or musical works for a limited duration of time. Copyright protects the original expression of ideas³ and not the ideas themselves. The right of the copyright owner to control the use of his works for personal gain or profit is essential in copyright law. Copyright law ensures that a rights holder has the right to exploit and control exploitation of his work.⁴ There are various schools of thought on the rationale and justification of copyright but for the purpose of this thesis, the discussion shall be confined to the two systems of copyright protection and their

² Music copyright, for the purpose of this thesis refers to copyright law as it relates to music.

³ *University of London Press Ltd v Tutorial Press Ltd* [1916] 2 Ch. 601 at 608.

⁴ Owen H .Dean, (1987) *Handbook on South African Copyright Law*, Johannesburg: Juta (as revised in 2005). p. 1-1.

broad philosophical underpinnings.⁵ The two systems that developed separately in the United Kingdom and France were to play a significant role in the development of the current copyright laws.

By the late 19th century, there were two distinct systems of copyright in Europe, namely the author's right system and the copyright system.⁶ Under both systems, technological advances especially in information technology influenced the development of copyright.⁷ Initially, protection was granted against unauthorised copying of literary works but with time, protection covered musical as well as dramatic works. It should be noted that these two systems form the basis of most current national laws.⁸ The main difference between the two systems is that the *droit d'auteur* (author's right) system as found within the civil jurisdictions emphasised on the author's individuality.

Under the common law system, the emphasis was on the work, the economic aspect of the work.⁹ The '*droit d'auteur*' system is based on principles of natural justice; the author is creator of a work, which is an expression of his individuality. The common law system lays emphasis on the economic argument of property; it is more concerned with the commercial right.

⁵ For more comprehensive readings on the rationale and justification of Intellectual Property in general and on copyright, see Michael Lehmann. (1985). *Theory of Property rights and the Protection of Intellectual and Industrial Property*, IIC 16, Christopher May. (2000). *Global Political Economy of Intellectual Property Rights*. Routledge: London. Edwin. Hettinger. (1997). Justifying Intellectual Property Law, in Adam More. (ed). *Intellectual Property: Moral and Legal Dilemmas*. J.A.L.Sterling (2003). *World Copyright Law*. London: Sweet and Maxwell p55. Gillian Davies. (2002). *Copyright and the Public Interest*. London: Sweet and Maxwell, pp. 9-17.

⁶ Garnett, K. *et al Copinger and Skone Jones on Copyright* p. 31. The Socialist system as in the case of the USSR was based on the social argument. See S.M. Stewart. (1989). *International Copyright and Neighbouring Rights* London: Butterworths. p. 6, O.H Dean A Doctoral Thesis for the University of Stellenbosch. p.3. Davies, G. *Copyright and Public Interest*. pp. 19-23.

⁷ *Ibid.*

⁸ *Ibid.*

⁹ *Ibid.*

3.1.1. Economic Theory

The economic rationale contends that copyright protection is there to promote creativity by rewarding the creative authors while ensuring that the users have access to the works. It is all about creating a balance between the interests of rights holders and users of copyright works. Society benefits from copyright protection and other intellectual property because it stimulates production as well as distribution of knowledge and culture. Copyright creates an intellectual property right that helps prevent free riding by third parties, by providing an incentive to create.¹⁰ Property rights in creative works are the best instruments to achieve economically efficient allocation of information goods.

Authors, it is assumed, need an incentive to create. Unauthorised commercial use of works by third parties will deter the author from creating. Copyright creates a system whereby the copyright owner is granted the exclusive right to use or exploit his work in order to: firstly to compensate and reward him for his effort and creativity and secondly, to act as an incentive for further creativity.¹¹ The reward or incentive results from the opportunity for the author to gather all the fruits of his creativity for a limited period of time.¹² This argument forms the basis of the copyright system.

Copyright grants economic rights to the author to prevent the unauthorised reproduction, distribution and communication to the public of protected works.¹³ The

¹⁰ For further reading on creativity, incentive and rewards, see Ruth Towse. (2001). *Creativity, Incentive and Reward*. Edward Elgar UK, pp.1-23.

¹¹ William Fisher (2001). Theories of International Property, in Munzer S. (ed). *New Essays in Legal and Political Theory of Property*. William M. Landes and Richard A. Posner, (1989) "An Economic Analysis of Copyright Law", 18 *J. Legal. Stud.* 325 available at <http://www.law.harvard.edu/faculty/tfisher/iptheory.html>.

¹² Dean, O.H. (1987) *Handbook on South African Copyright Law* *supra* footnote 4, p.1.1.

¹³ The works of Jeremy Bentham and others who argue that utility is based on ensuring the greatest benefit for all has largely informed the economic approach.

economic theory entrenched therein rationalises copyright protection as an incentive for the creators. This has been well summarised by some scholars in the United States as hereunder:

“Copyright law exists to provide a marketable right for the creators and distributors of copyrighted works, which in turn creates a marketable right for the creators and distributors of copyrighted works, which in turn creates an incentive for production and dissemination of new works.”¹⁴

Copyright protection is thus seen as an incentive for creative authors. This theory is based on the assumption that creative authors would not create where no copyright protection exists.¹⁵ From this perspective, it may be assumed that creativity depends on the protection of the works from unauthorised use and the effective enforcement of the rights granted by law.¹⁶ The copyright system shaped the legal regime and enforcement structures in countries that inherited the common law system in Africa.

¹⁴ Julie Cohen. *et al.* (2002) *Copyright in a Global Economy*. New York, Aspen Law p.7.

¹⁵ The above rationale has been sceptically received by some judicial authorities. It is noted that the earliest form of copyright that was granted to the printers and stationers was a monopoly right whose objective was to protect the published material. (See the *obiter dictum*, *Biotech Laboratories (Pty) Ltd v. Beecham Group PLC & another* 2002 (4) SA 249 (SCA), at p. 259). The question as to whether copyright stimulates production and distribution of knowledge and culture is debatable as in the pre copyright era; this was still possible without the encumbrances conferred by the legal system. The growth of the cultural industries and the dissemination of knowledge in countries with little or no copyright protection indicate otherwise. More recently, there have been arguments put forward that copyright impedes the dissemination of knowledge especially in the developing countries due to the high cost of obtaining the knowledge from the right holders. The lack of protection does not necessarily hinder the creative mind especially in the music industry, instead the creators continue to produce music but supplement their income from other sources. In Senegal, the majority of musicians cannot survive on their music and have to supplement their income. This is true for most artists in the developing countries save for the few who have managed to carve their niche in the industry both locally and internationally. However, for other right holders such as the record companies and publishers, copyright protection provides an incentive as they are more concerned with the economic returns and would be unwilling to invest in an industry that is full of risks and their rights are not legally secured.

¹⁶ However, there are societies where creative works thrived even when there was no copyright protection present. Examples are Russia where there were many creative authors in music, operas, and books among others. In pre-colonial Africa, the creative arts like music still prospered and this shall be discussed in greater detail below. The copyright system emphasises the economic aspect of the work.

3.1.2. Natural Rights Theory

Natural rights arguments centre on the person of the author who is thought to deserve a just reward for his/her intellectual labour or have a natural right in their creations. Whoever invests in time and effort in the production of goods and services is entitled to the exclusive rights in them. The author's rights system favours the natural rights argument. This is the basis of various provisions of law in civil law countries like Senegal especially with regard to authorship, ownership, exploitation and enforcement of the rights within the music industry.

In the civil law tradition, creativity is regarded as part of or embodiment or extension of the creator's persona; creative works are a creation of the author's mind. Under this system, copyright is perceived to be a human rights issue and should be granted, as it is morally required. Professor Jane Ginsburg noted as hereunder:

“...Post revolutionary French laws and theorists portray the existence of an intimate and almost sacred bond between authors and their works as the source of a strong literary and artistic property right. Thus, France's leading modern exponent of copyright theory, the late Henri Desbois, grandly proclaimed: ‘the author is protected as an author, in his status as a creator, because a bond unites him to the object of his creation. In the French tradition, Parliament has repudiated the utilitarian concept of protecting works of authorship in order to stimulate literary and artistic activity.’”¹⁷

¹⁷ Jane Ginsburg, (1990). A Tale of Two Copyrights: Literary Property in Revolutionary France and America, 64 *Tul. L. Rev.* pp. 991- 992.

Emphasis is on protection of the author as the creator of the work.¹⁸ This system is the closest to the traditional concept of authorship found within the various communities in sub Saharan Africa.¹⁹ Civil law countries in Africa seem to have more vibrant creative industries than common law countries.²⁰

The economic and natural rights approach to property is embodied in the Universal Declaration of Human Rights of 1948. It protects the rights to ownership of property as well as guarantees the freedom against arbitrary deprivation of property.²¹ In terms of creativity, the Convention grants the rights for everyone to freely participate in the cultural life of the community and enjoy the arts as well as share the scientific advances and benefits. This Article emphasises both the individual and popular participation in the productive, distributive and consumptive as well as entertainment processes in society.²² Everyone has the right to protection of moral and material interest resulting from any scientific, literary or artistic production, of which he is an author.²³ Under this article, the emphasis is on the individual interest in creativity and innovation. Interestingly, this article encompasses both the economic and natural rights perspectives of copyright by providing for moral and material or economic rights of the creator. Several legal systems in Africa have adopted a similar approach

¹⁸ For further reading on the history of copyright and author's right, see David Burkitt, (2001), *Copyright Culture- the history and cultural specificity of the Western Model of Copyright. I.P.Q.* pp. 146-186.

¹⁹ See paragraph 2.2 above.

²⁰ Countries like Senegal and Mali have distinct cultural policies that promote the development of cultural industries, which contrasts with the situation in the common law jurisdictions where there is distinct lack of strong cultural policies except for countries like Nigeria. Kenya and Botswana are yet to formulate cultural policies.

²¹ Article 17 UDHR 1948.

²² Article 27 (1) UDHR 1948.

²³ Article 27(2) UDHR 1948.

to copyright protection. They provide for both economic and moral rights of the author.²⁴

Professor Goldstein in addressing the issue of the philosophical foundations of copyright law noted the following:

“On one side are lawyers who assert that copyright is rooted in natural justice, entitling the authors to every last penny that other people will pay to obtain copies for their works. These are the copyright optimists: They view copyright’s cup of entitlement as always half full, only waiting to be filled still further. On the other side of debate are copyright pessimists, who see copyright’s cup as half empty; they accept that copyright owners should get some measure of control over copies as an incentive to produce creative works, but they would like copyright to extend only as far as necessary to give this incentive, and treat anything more as an encroachment on the general freedom of everyone to write and say as they please.”²⁵

In Chapter 2, the author discussed the issue of ownership of music in traditional communities within the continent.²⁶ This was similar to the natural rights theory as music was seen as emanating from the individual. Enforcement, as discussed below was influenced by *inter alia* societal perceptions on music copyright.²⁷ Enforcement of rights is necessary to ensure that the creative artists benefit from the protection offered by the law.²⁸

²⁴ Countries like Kenya, Tanzania, South Africa, Ghana and Nigeria have copyright systems based on common law but do provide for the protection of moral rights.

²⁵ Paul Goldstein, (2003). *Copyright's Highway*, Stanford, Stanford University Press pp. 10-11.

²⁶ See Paragraph 2.2 above.

²⁷ The societal perceptions are some of the factors that influence enforcement of copyright in the music industry. See paragraph 4.2.3.

²⁸ See paragraph 4.3.2.

3.1.3. Related Rights or Neighbouring Rights.

The copyright system lays emphasis on the economic rights and this has led to extension of protection to non-traditional kinds of copyright works such as films, sound recordings, computer software as well as photographs. The author's right system on the other hand lays emphasis on the work being the extension of the person and is reluctant to consider legal entities to be eligible for copyright protection. Under this system, the film producers are protected under *droits voisins du d'auteur*; the rights related to copyright otherwise known as neighbouring rights.²⁹

In several common law jurisdictions, no attempt is made to draw a distinction between copyright and related rights within the legal instruments.³⁰ The protection of rights of producers of sound recordings underlies the need to protect the economic investment made by the record companies who as have been discussed earlier under paragraph 2.4, are considered to be the cornerstone of the music industry. The protection of sound recordings was included in several countries within the region in the last twenty years.

In the music industry, producers of sound recordings are the forefront of enforcement, as they have to protect their investments in the works. The music producers form associations and work with the law enforcement authorities to ensure that third parties do not exploit their works.³¹ Before discussing the historical perspectives on music copyright law in sub Saharan Africa, it is important to examine the international laws,

²⁹ Garnett. K. *et al Copinger and Skone James on Copyright op cit* pp. 1283-1284.

³⁰ Under the Kenyan Copyright Act of 2001, the Act extends copyright protection to the producers of sound recordings and performers although their rights are listed separately from the 'traditional' copyright. The same applies to Ghana, Nigeria and Zimbabwe. In South Africa, the Performers' rights are protected under the Performers Rights Protection Act of 1967.

³¹ See paragraph 5.6.

how they developed and influenced the development of music copyright in the region. The impact of international law on enforcement of copyright in sub Saharan Africa will be examined further in paragraph 4.3.

Societal perceptions and political, social and economic factors, as will also be discussed in paragraph 4.2.3, influence of enforcement of copyright in any given jurisdiction. These perceptions may have been influenced by the system inherited by each country.³²

3.2. International Protection of Copyright and Related Rights

The need for an international framework for the protection of copyright became evident in the early 19th Century. Cross border trade in European art, and music required that composers together with authors in the music industry were adequately compensated due to exploitation of their works abroad. Composers as well as authors were obliged to license their works to foreign publishers who would safeguard their interests.³³ National laws were no longer effective in protecting foreign music. The development of international copyright law especially in relation to the music industry can be divided into three phases:³⁴ The first phase from 1880s to 1930 saw the birth of the Berne Convention for the Protection of Literary and Artistic Works 1886 and its subsequent revisions.

³² For instance, in South Africa whose law was influenced by common law, there are strong industry organisations such as Recording Industry of South Africa (RISA), which are at the forefront of enforcement of copyright.

³³ For further reading, see David Laing, (2004). Copyright, Politics and the International Music Industry, in Simon Frith and Lee Marshall, (eds.) *Music and Copyright*. 2nd Edition Edinburgh, Edinburgh University Press, p.70.

³⁴ *Ibid.*

Phase two was marked by the growth and development of mechanical as well as electronic media such as radio, television, cinema and sound recordings. This led to the protection of what are known as neighbouring rights within the realm of copyright law. The third phase was greatly influenced by the international trade in copyright and the cultural industries. Major copyright industry players such as the music, film, software and publishing industries drove this especially from the United States.³⁵

There are several international conventions in the area of copyright and related rights that tried to harmonise international law in this area. These were later to influence the development of copyright and related rights including enforcement as will be critically analysed in paragraph 4.3.

3.2.1. The Berne Convention

The Berne Convention for the Protection of Literary and Artistic Works is regarded as the oldest international copyright treaty and is based on three main principles namely: the principle of national treatment, automatic protection of works and independence of protection.³⁶ Article 5(2) of Berne prohibits *formalities* as a prerequisite to the subsistence, enjoyment, exercise, protection, and enforcement of copyright.

³⁵ During this period, copyright was included in the World Trade Organisation (WTO) agenda through the Trade Related Aspects of Intellectual Property Rights (TRIPS).

³⁶ Reference is made to the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 24 July 1971, as amended on September 29 1979). The Convention, which is largely based on the continental European approach, lays down the minimum standards required for the protection of literary and artistic works. The protection of musical works was only included in the Convention in 1928. The colonial regimes were committed to the obligations under the Berne Convention. This was through the colonial powers that had signed the Berne Convention in 1886. After independence, most of the former colonies in Africa formally acceded to the Berne Convention due to the international pressure although most of the provisions had already been incorporated into their post independence national laws. See Paul Goldstein. (2001). *International Copyright Principles, Law and Practice* New York: Oxford University Press. p. 22. See also commentary by Alan Story, (2003). Burn Berne: Why the Leading International Copyright Convention must be Repealed. *Houston Law Review*. Vol. 40 (3) p. 768.

This was the effect of the Berlin Act of 1908. The absence of certificates as proof of ownership could have influenced the enforcement of copyright, which as will be discussed in paragraph 4.3.1 influences the level of copyright enforcement.

The Convention was revised several times and in 1967, the Stockholm Convention introduced the controversial protocol regarding developing countries.³⁷ Developing countries considered protection granted by the Berne Convention extensive and thus not in their interests given their prevailing domestic circumstances at that time.³⁸ The Protocol allowed Members who ratified the Convention to make their reservations with respect to certain provisions.³⁹ Although most countries in Africa except for South Africa did not accede to the Berne Convention until the second half of the 20th Century, their laws were in conformity with its provisions. The Berne Convention has in many ways contributed to the existing legal framework within Africa.⁴⁰

3.2.2. Rome Convention and the Phonograms Convention

When the Berne Convention was adopted in 1886, the only means of exploiting music was through live performances and the sale of sheet music. By the early 20th Century, sound recordings became a new mode of communication of music to the public. Wireless technology relied on sound recordings to transmit music to wider audiences.

³⁷ *Ibid.*

³⁸ For further reading, see Sam Ricketson. (1999) *The Boundaries of Copyright: Its Proper Limitations and Expectations: International Conventions and Treaties*. 1 *Intell. Prop Q.* pp. 56- 75.

³⁹ The Protocol allowed developing countries to limit their terms of copyright protection, authorise translations of literary texts into the local languages, authorise publishing for educational and cultural purposes and allow reproduction for purposes of teaching, science and research as well as limit the scope of the right to broadcast. William R. Cornish. (1999). *Intellectual Property: Patents, Copyrights, Trademarks and Related Rights* Sweet and Maxwell London p. 347, For further reading, See Garnett, K. *et al Copinger and Skone James on Copyright* op cit p. 545 C. Masouyé, (1978). *Guide to the Berne Convention*. WIPO: Geneva, Sam Ricketson. (1987). *The Berne Convention for the Protection of Literary and Artistic Works*, pp.1886-1986, Centre for Commercial Law Studies, Queen Mary University of London. Chap 11. Johnson, C.F. (1971) "The Origins of the Stockholm Protocol." *Bulletin of the Copyright Society of the United States*, p.91.

⁴⁰ See paragraph 4.3.1.

In 1961, the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (the Rome Convention) was passed.⁴¹ It made provisions for protection of related rights.⁴² Several countries included protection of performers, broadcasting organisations and sound recordings in their laws.⁴³

Increased unauthorised commercial use of sound recordings had a negative impact on the music industry that through the IFPI pushed for a new international treaty that focused on the control and punishment unauthorised commercial use.⁴⁴ This led to the 1971 Convention for the Protection of Producers of Phonograms against the Unauthorised Duplication of their Phonograms (The Phonograms Convention). Kenya became a member of the Convention in 1976 and subsequently provided for the protection of the producers of sound recordings under the Copyright Act.

South Africa granted the producers of the sound recording the exclusive rights of reproduction, distribution, sale and communication to the public.⁴⁵ Nigeria grants the producers of sound recordings copyright in their sound recordings.⁴⁶ It is important to note, however, that Nigeria and South Africa are not signatories to the Convention.

3.2.3. The Trade Related Aspects of Intellectual Property Rights (TRIPS) Agreement

⁴¹ Rome October 26 1961.

⁴² These are the rights of the performers, producers of sound recordings and broadcasting organisations.

⁴³ Section 9 and 10 Copyright Act 1978 of the South Africa. See Sections 28, 29 and 30 Copyright Act of 2001, Kenya and Section 6, 7 and 23 Nigerian Copyright Act.

⁴⁴ Liang. D, Copyright, Politics and the International Music Industry, *supra*, footnote 33, p77.

⁴⁵ Section 9 [Amended by Act No. 56 of 1980 and Act No. 52 of 1984 and Act No. 61 of 1989] of the Copyright Act of South Africa.

⁴⁶ Section 6 Nigerian Copyright Act (as amended).

The Trade Related Aspects of Intellectual Property Rights (TRIPS) Agreement has had profound influence on the protection of copyright and related rights. It makes it compulsory for the WTO Member States to provide the minimum standards of protection as laid down by the TRIPS Agreement. The nature and scope of the TRIPS Agreement is clearly defined in Article 1(1).⁴⁷ The Agreement for the first time provides for minimum standards of enforcement of copyright at the international level.⁴⁸ The impact of TRIPS on enforcement of copyright will be discussed in greater detail in paragraph 4.3 with the practical implications examined in Chapter 5 and 6.

3.2.4. The WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty

The TRIPS Agreement was concluded in 1994 under the GATT Uruguay Round and captured what was then important within the Intellectual Property arena. New issues arose with the expansion and advances in digital technology, which brought about complex copyright issues that were not addressed by the TRIPS Agreement. Digital technologies allowed for reproduction and distribution of perfect copies of original works.⁴⁹ The WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) were concluded in 1996 at the WIPO Diplomatic Conference.⁵⁰

⁴⁷ The Article states; "Members shall give effect to the provisions of this Agreement. Members may, but shall not be obliged to, implement in their domestic law more extensive protection than is required by this Agreement, provided that such protection does not contravene the provisions of this Agreement. Members shall be free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice."

⁴⁸ See Paragraph 4.3.1.

⁴⁹ The Berne Convention and other International instruments on copyright were considered inadequate for the challenges that arose in the digital environment.

⁵⁰ The two treaties aimed at addressing issues that were raised by new technologies and were not addressed by the previous Conventions including the TRIPS Agreement. These two treaties made

The WCT has significant provisions with regard to the distribution right, rental right, right of communication to the public, limitations and exceptions as well as technological protection measures and rights management information.⁵¹ As technology develops, copyright tries to keep abreast with the changes. Copyright owners have come up with devices especially in digital networks, to secure their works. Examples are digital watermarks, banderols used on sound carriers, encoding of programmes etc.⁵²

There are instances where third parties try to circumvent these technologies to access the protected works. The WCT has provisions, which make it illegal for third parties to circumvent technological protection measures that have been used by the copyright owners.⁵³ It also outlaws removal of digital rights management systems that have been put in place by the rights holders and provides for effective legal remedies against the infringers.⁵⁴ Rights of performers and producers of phonograms are secondary to rights of the composers, and authors of copyright works.

The exclusive right of making available copies of performances fixed in phonograms is provided under WPPT.⁵⁵ The WPPT provides for technological protection measures and electronic rights management systems.

provisions for the so-called "Digital Agenda". See Asein J. *Nigerian Copyright Law and Practice* Abuja, Nigerian Copyright Commission p.226.

⁵¹ Articles 6-12.WCT. The provision for the distribution and rental rights especially within the digital environment grants the authors greater protection for their works. In the music industry, these provisions are important as the digital reproduction and distribution of the music can easily be done by persons other than the rights owners at a minimal cost.

⁵² The Banderol will be discussed in greater detail in paragraph 5.1.

⁵³ See paragraph 4.3.

⁵⁴ Article 12 WCT.

⁵⁵ Articles 8 and 12 WPPT.

It makes the circumvention of technological measures illegal.⁵⁶ These international treaties, as will be discussed below, had an impact on the development of copyright and related rights in Africa. They have also shaped the enforcement regime in sub Saharan Africa. To put things in perspective, the author shall in the following paragraphs examine the development of copyright in sub Saharan Africa.

3.3. A Critique of the History and Development of Copyright Law in Sub Saharan Africa

The following paragraphs shall provide a critical analysis of the history and development of copyright in sub Saharan Africa from the 18th Century to present day. This section will also analyse how this development was influenced by external factors such as the colonial systems and the international legal regime and their impact on enforcement of music copyright.

3.3.1. Protection of Copyright prior to 1870

Africa, prior to the colonial era, had its own laws and mechanisms for property rights and enforcement. In the traditional African setting, societies were governed by social norms, customary laws and taboos. These provided the framework within which members of the society could interact with each other. In the case of handicrafts and other artistic works, branding or the use of a particular style or technique identified the source of the product. In the case of music, specific styles and rhythms were attributed to the communities where the works originated.⁵⁷ There were certain songs and dances that could be performed by any member of the community. However,

⁵⁶ Articles 18 and 19 WPPT.

⁵⁷ Based on interview with Mr. Sylverse Anami the Director of Culture, Department of Culture, Nairobi June 2005.

there were taboos associated with performing specific music such as dirges, and religious music. In some communities, it was customary for a particular person, clan or family to compose and perform music.⁵⁸

These indigenous systems worked well before the arrival of colonial powers. At the advent of colonialism, the main colonial powers, namely France and England assumed that these systems were not workable. They were replaced by their own legal systems and structures. Traditional and indigenous systems were made redundant and would only apply in matters that were of little or no consequence to the colonial regime.⁵⁹ One scholar clearly captured this in the following:

In the pre-colonial era indigenous legal institutions were evolving, more rapidly than is sometimes appreciated, on a tribal or local basis. Each was autonomous, though there was some cross-cultural influence and the laws of macro ethnic groups tended to keep their similarity. The laws were unwritten, except where Islam and the law of the sacred texts had intruded...Although deriving mainly in theory from ancient custom, in practice the indigenous laws relied on the contributions of legislation by state, tribal, or local authorities and on judicial formulation by adjudicators or arbitrators for many of their detailed rules and for the modification of rules to suit changing circumstances.⁶⁰

The colonial regime failed to recognise these systems for various reasons. First, the laws in most of the communities did not exist in written form save for the

⁵⁸ *Ibid.*

⁵⁹ For more comprehensive reading on the evolution of law in Africa see Anthony Allot, *The Future of African Law*, in Kuper. H, *et al* (eds.) (1996). *African Adaptation and Development*. California: University of California Press. pp. 216-240.

⁶⁰ *Ibid.*

communities that had a strong Islamic influence.⁶¹ Secondly, they did not understand the customs and culture of the people they imposed their legal systems upon. They subsequently thus did not take time to learn and adopt the relevant legal structures. They relegated the customary laws for secondary issues that arose among the communities. As a result it had a negative impact on the traditional legal systems, which have since been abandoned or used in very rare cases. Maybe if these systems were allowed to develop, the current problems experienced in the music industry might not have arisen but we shall never know.

3.3.2. The Colonial Era

The dynamic growth of the traditional legal systems was interrupted by the advent of the colonial era, which had no regard for existing systems. In an attempt to 'civilise' Africans, colonial powers imposed their legal regimes within the colonies. These laws were entrenched over the years and have become part and parcel of the current legal regimes within the continent.⁶² In essence, there were two main legal systems that were introduced to Africa, the civil law system predominantly in the French speaking colonies, while the common law system was introduced to the English speaking colonies.⁶³ In the French colonies, Bryde captured the transplantation of the French laws as hereunder:

“Apart from specific interest groups, the colonial policy maker had to take the interest of the metropolitan electorate into account, which amounted generally to the demand that the colonies had to be administered in a way profitable to

⁶¹ Examples are the Hausa in Nigeria, and the Bajuns along the East African Coast. Ethiopia and Eritrea had a written tradition although they were free from Islamic influence.

⁶² Assafa Endashaw, (1996). *Intellectual Property Policy for Non-Industrial Countries*. Dartmouth Publishing, pp. 146-160.

⁶³ Other civil law systems were those that were introduced to the Portuguese, Spanish, Belgian and Italian colonies. See Paragraph 3.1.

the *metropole*. Given these influences of the colonial resources in the interest of the *metropole* was a much more important aim than the development of the colonies in the interest of their indigenous population.”⁶⁴

It is clear from the above the laws enacted by the French Colonial regime were for the benefit of the French citizens and not the indigenous population.

In English colonies, the laws applied by the colonial regime including copyright were replicas of the existing law in England. These were enacted in the colonies without consideration as to whether or not they were suitable for the local conditions. They were a verbatim replication of English legislation on the same subject matter.⁶⁵

Sometimes legislation by reference was exercised in accordance with the law and practice prevailing in England from time to time. In parts of East Africa, Indian Statutes were made to apply.⁶⁶ It is not surprising then to find that most copyright laws in sub Saharan Africa are the same as what was the law in England and France over 50 years ago. The current copyright law, like most other laws in sub Saharan Africa, can be traced back to the 19th century when European countries consolidated their interests in their colonies. Northern and Southern Nigeria Protectorate, the East African protectorate among others were treated as parts of the United Kingdom.⁶⁷ The local non-settler population had no input whatsoever in the creation and enforcement

⁶⁴ Allot A. *Intellectual Property Policy for Non-Industrial Countries*. *op cit*, p. 151.

⁶⁵ If for example, a colony needed a Business Corporations Act, the Colonial Office would despatch a copy of the latest English Companies Act and it would be re-enacted in the colony without consideration of whether it was really appropriate to the local conditions. Thus in West Africa, Ghana's Companies Act was the English Act of 1862, Nigeria that of 1908, Sierra Leone's that of 1929 and only the Gambia, the least developed and the last to ask for legislation, had the latest English Act of 1948.

⁶⁶ Allot A. *Intellectual Property Policy for Non-Industrial Countries*, *op cit*, p. 153.

⁶⁷ Kenya and Uganda were part of the Protectorate. Tanganyika came under the British rule after the world war when Germany lost all its colonies in Africa and other parts of the world.

of the laws. Any modifications made by the local colonial legislature only applied to the protectorate within which they were made.⁶⁸

Both French and British systems had three types of laws that were applied within the colonies. Under the British colonies the first tier was the English law as was applied in the United Kingdom. This was mainly applicable to British subjects within colonies and it included company law, intellectual property law, evidence and contract. The second type included laws that were enacted by colonial regimes within the colonies as applicable to the inhabitants. The third type was the customary or traditional law, which covered areas that could not be effectively dealt with by English laws. It formed the basis of what was to be known as the system of "indirect rule." The French had a similar system, which included the French Metropolitan law direct from France as was enacted within the colonies, the local enactments within the colonies and customary law as practised by the local people.

Copyright law was placed within the first tier as was demonstrated by the enactment within the British colonies of the 1911 Copyright Act. Through various Orders-in-Council, the Act was declared as the operative copyright law within the colonies, except the self governing territories. The 1911 Copyright Act governed the territories under British rule, excluding self-governing territories. The British applied their laws as would have been applied back in their countries of origin.⁶⁹ The 1911 Act came into force in the protectorates in 1912. In South Africa, it was declared the operative

⁶⁸ Section 27 of the UK Copyright Act of 1911.

⁶⁹ Section 25(1) UK Copyright Act of 1911.

law.⁷⁰ In Nigeria, an Order-in-Council extended the application of the 1911 British Copyright Act to the protectorates of Northern and Southern Nigeria.⁷¹

The introduction of UK copyright law to the colonies served two main interests; first, the interests of British authors who were settlers within the colonies and protectorates. Second, it would secure the copyright works created by the British authors within the colonies. The law was clearly meant for foreign works of British origin and not local works of by communities within their colonies and protectorates.⁷² In effect it alienated copyright laws from the local population. The net result was poor enforcement of copyright and related rights even after independence. The 1911 Act *inter alia* made provisions for the protection and enforcement of copyright in musical works.

The history of copyright law in South Africa goes back as far as 1803 when it had a form of Roman-Dutch “common law” and could be traced back to the Copyright Act of the Batavian Republic of which the Cape was a province.⁷³ The first copyright infringement case was determined in 1861.⁷⁴

By the time the Union of South Africa was formed in 1910, the above law excluding the Orange Free State governed most of the States. It had its own Roman-Dutch common law copyright. The current copyright law however can be traced back to the 1916 Copyright Act of South Africa. This Act declared the 1911 English Copyright

⁷⁰ The Act of 1916 (South Africa) incorporated as a schedule the United Kingdom Copyright Act. This Act was applicable in addition to section 141 to 160 of the 1916 Act.

⁷¹ Order-in-Council No. 912 Of 1912 made by virtue of section 28 of the Act. For further reading see Asein, J, *Nigerian Copyright Law and Practice*, *op cit.* p. 28.

⁷² See paper by Bankole Sodipo, B. (2004). “Intellectual Property Policy and Economic Development in Nigeria” Presented at the ESRC Seminar London October 2004.

⁷³ Dean. O. H, *Handbook on South African Copyright Law*, *op cit.* pp. 1-3.

⁷⁴ *Dickens v. Eastern Province Herald* (1861) 4 Searle 33.

Act applicable in South Africa together with the provisions contained therein. The Act effectively repealed the previous copyright law.⁷⁵

It is important to note that by an Order-in-Council issued under the 1888 Act, the Berne Convention was made applicable to all British dominions.⁷⁶ Through the above-mentioned Order-in-Council, its application was extended to countries like Kenya and Nigeria, which were then part of the British colonies. South Africa ratified the Berne Convention in 1928. The development of copyright law before and during the colonial era had an effect on the development of the music industry and enforcement of rights within the colonies.

3.3.3. Post Independence Copyright; 1957 –1995

After independence, not much was done in terms of enacting different copyright laws. Newly independent governments simply changed titles and retained the substance of copyright law. Intellectual property regimes were carried over after independence. These laws were entrenched over the years and have become part and parcel of the current national copyright laws within sub Saharan Africa.⁷⁷ A few countries like Nigeria attempted to make adaptations in the area of Intellectual Property (IP).

The domestic laws, however continued to be based and influenced by the colonial legacy. International treaties and conventions to a certain extent contributed to efforts to change laws. It is notable that major amendments or changes coincided with

⁷⁵ Section 142 of the UK Copyright Act of 1916.

⁷⁶ Garnett. K. *et al Copinger and Skone Jones on Copyright, op cit.* p.43.

⁷⁷ For instance, the 1966 Copyright Act of Kenya was carried over from the Copyright Ordinance that was in force prior to independence.

ratification of international treaties. These international treaties are based on the laws of the OECD countries, which in effect continue to influence the IP laws in Africa long after independence. It not surprising that a cursory glance at the laws in the common law jurisdictions prior to 1990 shows that they are very similar to the English Copyright Act of 1956 with minimal amendments.

After inheriting the statutes from the colonial regimes, most countries went through a hiatus in terms of copyright as little effort was made to amend the laws as well as enforce copyright and related rights. There were three main factors that influenced the development of copyright laws in Africa after independence. First, the international laws governing copyright and related rights. Sub Saharan African Countries, by virtue of the colonial regime had included provisions of the Berne Convention in their laws. Secondly were the technological changes that had an impact on copyright industries such as music and computer software. Technological changes necessitated change in laws especially in areas that had not been envisaged by prior legal regimes. Reproduction techniques were getting more advanced and more easily available to unauthorised third parties thus required enhancement of penalties for copyright infringement.

Due to technology, music could be disseminated to a wider audience outside the country and there was need to have laws that would deal with such situations. And third was the issue of unauthorised use of copyright protected rights and the pressure from the producers of such works to ensure the protection and enforcement of their rights.

In the following section, the author shall examine the development of copyright laws in the four countries under study in light of the above-mentioned factors.

(a) Kenya

In Kenya, the United Kingdom Copyright Act of 1956 was the operative law until 1966 when Parliament passed the Copyright Act Chapter 130 of the Laws of Kenya whose provisions were largely adopted from its predecessor.⁷⁸ The 1966 Act was amended several times but there was one main amendment that would have an impact on the music industry and that was the protection of sound recordings.

The first major amendments were made in 1975. They introduced the legal protection of programme carrying signals. The next set of amendments came in 1989. These ensured that the Act protected the rights in sound recordings and performances. The last major amendment was in 1995, which brought computer programs and compilations of original data under the realm of literary and artistic works.

In 2001, the Copyright Act 2001 was passed by Parliament and came into force in February 2003. It repealed the Copyright Act, Chapter 130 of the Laws of Kenya. The Act was the result of various consultations by the Government with the various stakeholders and industry players.

In addition to the minimum standards of protection provided by international conventions, the new law sets out stronger administrative structures and enforcement mechanisms.⁷⁹

⁷⁸ Prior to the 1966 Act, the 1956 Copyright Act of the United Kingdom extended various Orders in Council including Kenya as from July 4 1963. The Copyright (Kenya) Order, 1963 (S.I 1964 No. 689).

⁷⁹ See paragraph 4.3 below. For further reading on development of Copyright Law see Sihanya. B. *Constructing Copyright and Literary Creativity in Kenya, op cit* pp.11-28.

(b) South Africa

The 1965 Act in South Africa repealed the 1916 Act.⁸⁰ The 1965 Act borrowed largely from the British Copyright Act of 1956. Act No. 98 of 1978 repealed the 1965 Act. There were seven amendments to the Act between 1978 and 1992.⁸¹ In 2002, the Act was amended to include the provision for needle time.⁸² The Performers' Protection Act of 1967 was passed to protect the performers' rights, as they were not covered under the Copyright Act. In 1997, South Africa, in addition to the existing Copyright law, passed two laws, the Counterfeit Goods Act and the Intellectual Property Laws Amendment Act.

(c) Nigeria

In Nigeria, the UK Copyright Act of 1911 was the copyright law applicable in Nigeria until 1970. The Act was selective in application of some sections. For instance, although it provided for the usual remedies, the criminal sanctions contained in section 11 were limited to the United Kingdom.⁸³ The Act further introduced the entrepreneurial copyright, which recognised copyright in relation to investors in the music industry such as the producers of the sound recording as opposed to the performing artists.⁸⁴ This would provide an incentive to record labels that were to invest in the music industry in Nigeria.⁸⁵

⁸⁰ Section 48(2) of the Act of 1965. The Act came into force on 11th September 1965.

⁸¹ Dean.O.H, *Handbook on South African Copyright Law*, *op cit* .p.1-4.

⁸² Section 9A made it illegal for any one to broadcast or transmit the sound recording without a licence from the owner of the sound recording.

⁸³ Section 13 UK Copyright Act 1911.

⁸⁴ Cornish. W.R, *Intellectual Property: Patents, Copyrights, Trademarks and Allied Rights*. *op cit* p.300.

⁸⁵ See Chapter 2. Paragraph 2.2.

The 1970 Nigerian Copyright Act came into force and repealed the 1911 Act.⁸⁶ The Act was influenced by the Universal Copyright Convention and was passed to ensure that the law was in conformity with the said Convention.⁸⁷ It expanded the nature and scope of copyright protection to include the exclusive right of reproduction, communication to the public as well as broadcasting.

Technology had an effect on the legal protection of copyright in Nigeria. Unauthorised commercial use was on the increase and the remedies provided by the Act were perceived to be inadequate and non remedial as the right holder was not adequately compensated and the infringers were deterred. The Copyright Act was not adequate and in 1988, a new Copyright Decree was promulgated.⁸⁸ The passing of this Act was mainly driven by the local copyright industry. It came as a result of intense lobbying from local authors, publishers, record companies and other copyright holders. New mechanisms for administration and enforcement were introduced such as the establishment of a government body to deal with the administration of copyright and ensure the enforcement of the rights.⁸⁹ The Act was amended in 1992 and the most recent amendment was in 1999.

The 1999 amendment is of interest to the music industry as, it among other things, criminalises the sale of music without the anti piracy security device.⁹⁰ It confers police powers and privileges on copyright inspectors.⁹¹

⁸⁶ John Asein. (2003). *Nigerian Copyright Law and Practice*. Nigerian Copyright Commission: Abuja p. 29.

⁸⁷ *Ibid*.

⁸⁸ Decree No. 47 of 1988, which became the Copyright Act Chapter 68, Laws of the Federation of Nigeria 1990.

⁸⁹ See paragraph 5.1.

⁹⁰ Section 18A Copyright Act of Nigeria (as amended).

⁹¹ Section 32A Copyright Act of Nigeria (as amended). Section 15A see also the cases of *Musical Copyright Society Nigeria Limited v. Details Nigeria Ltd* Suit No. FHC/L/CS/434/95 and *Musical Copyright Society of Nigeria Ltd v. Ade okin Records* Suit No. FHC/L/CS/216/96. For further reading

(d) Senegal

In Senegal, the legal regime on copyright was based on the civil law system as inherited from France. Prior to independence, the laws of France were applicable based on the tier system. The Copyright Act was passed in 1973 and has undergone various amendments. There were proposals to amend the Act in 1998 substantially and possibly come up with a new law that would supersede the existing one while ensuring that it reflects the needs of the authors in Senegal. This proposal has yet to materialise.⁹² The Government commissioned an expert to comment on the Bill and she in turn submitted her report. The report is to be used as one of the working documents that will be used by the main actors within the cultural sector in Senegal when discussing the Bill.⁹³ If these discussions are focused and encompass the interests of the right holders, then there is a possibility of a more comprehensive law being passed.⁹⁴ The law in Senegal criminalises unauthorised commercial use but only provides for fines.⁹⁵

From the above discourse, the author notes that copyright law in sub Saharan Africa was greatly influenced by foreign legal regimes, international pressure as well as the internal pressure from the creative industries.⁹⁶ The civil law countries have been slow

on the development of Nigerian Copyright Law, Asein J. *Nigerian Copyright Law and Practice. op cit*, pp. 22-38.

⁹² A Copyright Bill was drafted in 1998 with the help of the World Bank and the AMS.

⁹³ A particular World Bank Fund was used to finance the process of developing a new law and a working group comprising of the Ministry of Culture, the Copyright Office of Senegal and professional organisations in the music industry were set up. It has so far experienced some drawbacks due to lack of cohesion between the representatives of the Ministry of Culture and the representatives of the professional bodies. As per the time of drafting this thesis, there were no further developments.

⁹⁴ The information is based on a brief by Mr. Aziz Dieng of the Musicians Union in Senegal, July 2005.

⁹⁵ See Article 45 of the Copyright Act of Senegal.

⁹⁶ The Copyright Act in Ghana went through a similar transformation from 1957 to present day. In 1985, the Government passed what was then a new modern law, the PNDCL 110 that replaced the old Copyright Act of 1961. The law paved way for the regeneration of the copyright industry with the establishment of the Copyright Society of Ghana (COSGA) and strengthened the copyright office law.

to amend their laws or enact new copyright laws. However, unlike the common law jurisdictions, the civil law jurisdictions already had administrative structures provided for in their laws. The penalties are based on the Penal Code and the determination of civil cases on the Civil Procedure Code.

It is interesting to note that under the 1988 Copyright Patents and Designs Act of the United Kingdom, when a country ceased to be a colony, it continued to be treated as a country to which the copyright provisions extend for the purposes of qualification of copyright protection until laws were passed amending or repealing the previous provisions.⁹⁷

3.3.4. An Analysis of the Current Copyright Law in Sub-Saharan Africa

As the table below shows, countries in sub Saharan Africa conceptually and theoretically have complex, modern copyright laws. These countries are members of signatories to the Berne Convention and the TRIPS Agreement.

It is notable that only Senegal is a signatory to the WCT and the WPPT. However, Nigeria, South Africa and Kenya have all made relevant amendments to include provisions of the WCT and WPPT in their laws.⁹⁸

The law was seen to be a response to the problems faced by the copyright industry especially the music and book publishing industries, which were steeped in rampant piracy.⁹⁶ However, driven by the need to offer stiffer penalties, ensure compliance with TRIPS and the resolution of licensing disputes, the Copyright Act 690 was passed in 2004 and came into effect in June 2005. The Act received Presidential Assent in May 2005 after a long debate based on the contentious section 25 of the Act. The Act took a particularly long time to be debated by parliament and just before it was passed, there was serious objection to the provision that requires all sound recordings to be affixed with an anti piracy security device failure of which would amount to a criminal offence. Section 25 of the Copyright Act 690. The Coalition of Concerned Copyright Advocates (COCCA) lodged a US\$ 400 000 campaign to protest against the inclusion of the section in the Act. The opposition to the provision does not acknowledge the fact that with the introduction of Anti piracy security devices, the level of piracy has been reduced from over 90% in the early 1990s to about 25%.

⁹⁷ Garnett, K. *et al. Copinger and Skone James on Copyright*, *op cit* p.610.

⁹⁸ See Paragraph 3.2.4 above.

Nigeria on the other hand recently passed the Optical Discs Act of 2007 to regulate the manufacture and distribution of optical discs in Nigeria. South Africa has the Performers Rights Act and the Counterfeit Goods Bill in addition to the Copyright Act of 1978 as amended in 2006.

Table 4 Copyright Law in Sub Saharan Africa

Country	Copyright Law	Other laws relevant laws	Pending legislation	Economic Rights	Exceptions and Limitations	Moral Rights	Civil and Criminal sanctions and penalties
Kenya	Copyright Act of 2001	X	Counterfeit of Goods Bill	Berne, TRIPS	Berne, TRIPS	Berne	TRIPS
Nigeria	Copyright Act of 1989 (as amended)	Optical discs Act, 2007	X	Berne, TRIPS	Berne, TRIPS	Berne	TRIPS
Senegal	Copyright Act of 1973	Criminal Procedure Code	Amendment of 1973 Act	Berne, TRIPS WCT, WPPT	Berne, TRIPS WCT, WPPT	Berne	TRIPS
Republic of South Africa	Copyright Act of 1978	Performers Rights Act, 1978, Counterfeit of Goods Act, 1997	X	Berne, TRIPS	Berne, TRIPS	Berne	TRIPS

South Africa passed the Performers' Protection Act of 1967 and made provisions for protection of sound recordings and broadcasting organisations in the copyright law. Kenya included protection of producers of sound recordings and performers in 1989. Kenya published the Counterfeit Goods Bill which is currently awaiting debate in Parliament. Senegal is still in the process of amending the 1973 Copyright Act. All four countries make provisions for economic and moral rights, exceptions and limitations to exclusive rights granted. They also provide for infringement of copyright as well as criminal sanctions and civil remedies for copyright infringement.

3.3.4.1. Rights Granted under Copyright Law

Copyright laws grant the author/rights holder the exclusive rights to reproduction in any manner or form of his works, distribution by way of sale, hire, and broadcasting, communication to the public, publishing, as well as translation, adaptation and arrangement of the work.⁹⁹ The music industry is composed of several rights holders namely authors and composers, producers of sound recordings and performers. It is in their interest that their rights are protected and effectively enforced. There are however instances where the works can be used without the author's authorisation.

As copyright only protects the expression of the idea, in the case of music, once the idea has been reduced to material form, be it sheet music or recorded music. Copyright belongs to the author, composer or publisher. Related rights are the rights of producers of sound recordings, performers and broadcasting organisations. These rights can be transferred by operation of law through licences or assignments.¹⁰⁰

The rights to the sound recording are distinct from those of the author and composer. In certain countries like Nigeria and Kenya, sound recordings are protected under copyright while others like Senegal the laws grant them separate "neighbouring" or related rights.¹⁰¹

⁹⁹ See Section 26 of the Copyright Act of Kenya, Section 6 of the Copyright Act of South Africa and Article 3 of the Copyright Act of Senegal.

¹⁰⁰ Section 33 Copyright Act 2001 of Kenya, section 10 Nigerian Copyright Act and section 22 Copyright Act of South Africa.

¹⁰¹ Copyright grants protection to the producers of the sound recordings. Various countries such as the United States, which only made the provisions in 1972, initially contested the inclusion of the protection of sound recordings. In the countries with the civil law tradition, copyright is usually granted to the person of the creator and since the producers of sound recordings are usually legal entities, it has been a bit difficult to rationalise the protection within the laws. The United Kingdom had the provision as far back as 1911. Prior to that there were no provisions for the protection of sound recordings and

Performer's rights are distinct from those of the composer or the songwriter. They are granted the rights in their performance. In countries like Kenya, Nigeria and South Africa, the rights of the performer, like in most other common law jurisdictions are treated as related rights.¹⁰² There is no express provision for the protection of performers *per se* in the laws of Senegal but they do make provisions for performance contracts between the authors and third parties to perform the work.¹⁰³

The late inclusion of the protection of the rights of the performers and producers of sound recordings in copyright law may be attributed to several factors. First, these countries had inherited laws from former colonial powers and since protection of performers was not included then, it was not incorporated in the post independence laws. Secondly, most countries were not and are still not part of the International Convention for the protection of Performers, Producers of Phonograms and Broadcasting Organisations (Rome Convention) of 1961, which introduced the performers' rights at the international level. There was no obligation to accede to the convention. Kenya, South Africa and Nigeria did make provisions for the protection of the performers and producers of sound recordings but was not party to the convention. Third, was the expansion of the scope of protected works under copyright

producer of sound recordings could not rely on copyright protection for his works. The producer of the sound recording is the person or company responsible for the production of the recording. He is the person who provides the facilities such as the studio, the manufacture and distribution of the sound recordings. A person who simply provides a studio for recording purposes at a fee is not a producer of sound recordings. See paragraph 2.2.

¹⁰² Part II Nigerian Copyright Act, section 30 Copyright Act of Kenya and Performers' Protection Act of 1967, South Africa, sections 23-25 Copyright and Neighbouring Rights Act of Botswana.

¹⁰³ Furthermore, unlike the laws from the common law jurisdictions, these laws do not define who a performer is. The question that has yet to be addressed in the music industry is who exactly is entitled to the performance rights. They are session- musicians who are paid for the recording at the studios are they entitled to the rights in the performance of the sound recording? It is notable that the protection of the rights of performers is relatively recent. See Article 37 Copyright Act of Senegal and Article 60 Copyright Act of Mali. In South Africa legislation was passed in 1967 to protect the performers separate from the existing copyright law while in Nigeria, the rights of the performers were only included in the 1988 legislation.

and several countries were still not willing to extend the scope of copyright protection. After 1996, sub Saharan Countries included the protection of performers in their laws although some like Kenya, Nigeria and South Africa are not party to the treaties.¹⁰⁴

So far the rights discussed above are economic rights that are granted by copyright laws to rights holders. There are rights that accrue to the author by virtue of the fact that he is the author of the works. These works are known as the moral rights or *droit moral*.¹⁰⁵ Under the South African Act, the author may not object to any modification that is absolutely necessary on technical grounds for the purposes of the commercial exploitation of the work. It is only applicable in the case of cinematographic works and computer programs.¹⁰⁶

¹⁰⁴ The United States only introduced the performers' rights in their legislation in 1994, which were quite strong and perpetual. This is different from the UK and Kenya, Nigeria and South Africa where the rights are granted for limited duration. For further reading see Susan Deas, (1998). *Jazzing up the Copyright Act? Resolving the Uncertainties of the United States Anti Bootlegging Law*, *Hastings Communications and Entertainment Law Journal* 20(3): 567-637 and David Nimmer, (1995). *The End of Copyright*. *Vanderbilt Law Review* (October) p.1411.

¹⁰⁵ The moral rights were initially found in the authors' rights legal systems and only introduced into international laws in 1928. It was introduced by the Rome Revision of the Berne Convention of June 2 1928. They were eventually incorporated in Article 9 of the TRIPS Agreement but it is one of the few provisions of the TRIPS Agreement that are optional for member states. This was influenced by the US that does not have a provision for moral rights and the inclusion of a mandatory provision for moral rights would not augur well with their entertainment industry that does a lot of modification to copyright rights. Countries like the United Kingdom provide for moral rights but allow the right holders to waive the right. These are the right of paternity and the right of integrity. The former is the right to claim authorship of the work; the right to be identified as the author of the work. This is a fundamental right, which identifies the author with the work. The latter is the right of the author to object to any distortion, mutilation or modification of his work, which includes the right to object to any derogatory work that might be prejudicial to the honour, or reputation of the author. See section 32(1) Copyright Act of Kenya, Section 11(1) Copyright Act of Nigeria, section 8(1) Copyright Act of Botswana, section 20 Copyright Act of South Africa, section 3 Copyright Act Senegal and section Article 30 Copyright Act of Mali.

¹⁰⁶ Waiver of moral rights is allowed in Botswana for as long as the waiver is in writing and specifies the extent of the modification of the work. In music, this allows the authors to enter into contracts with third parties from other countries, which do not protect the moral rights like the US or which allow for the waiver of the rights like the UK. The other countries have not made an express legal provision for the waiver, which means that the rights can only be alienated after the death of the author. Section 20(1) Copyright Act of South Africa. Section 8(3) Copyright Act of Botswana in the UK, it is common for recording companies to request the authors to waive their moral rights in the UK before signing the up. If for instance a band from the one of the Civil law countries like Sweden wants to sign up with a

The moral rights in Kenya, Nigeria, Botswana and Malawi are not transmissible during the lifetime of the author but may be transferred upon his death by testamentary disposition or operation of the law. Botswana and South Africa go a step further by allowing the successor in title the right to waive the moral rights.¹⁰⁷ Senegal and Mali clearly state that moral rights shall be imprescriptible and inalienable. The rights will remain part and parcel of the author even after their demise.¹⁰⁸

Countries like the United Kingdom allow for the waiver of moral rights but this is only applicable to the right of integrity and the right to modify the work. Modification will normally be for adaptation of works especially in films. In the case of music, modification of works may involve their use for positive campaigns.¹⁰⁹

The author has a right to seek legal relief for any infringement of the moral right.¹¹⁰ National laws provide for exceptions and limitations to the exercise of exclusive rights that include the use by third parties for educational purposes, scientific research, use for purposes of news for as long as the author is acknowledged. These shall be discussed in detail in the following paragraphs.

record label in the UK, there is a potential area of conflict as the moral rights in civil law countries are inalienable while in the UK they may be done away with.

¹⁰⁷ Section 32(1) Copyright Act of Kenya, section 11(2) Nigerian Copyright Act, section 8(2), Copyright Act of Botswana and section 9(2) Copyright Act of Malawi and section 20 Copyright Act of South Africa.

¹⁰⁸ Article 39 Copyright Act of Mali and Article 3 Copyright Act of Senegal.

¹⁰⁹ For further reading on moral rights, see Asein.J. *Nigerian Copyright Law and Practice op cit.* pp. 138-141, Bernard Sihanya (2003) *Constructing Copyright and Literary Creativity in Kenya* Unpublished Thesis Stanford p.74-78, Sterling, J.A.L. Sterling (2003) *World Copyright Law*, London Sweet and Maxwell pp. 281-303 discusses 5 categories namely the divulgation right, the paternity right, the integrity right, the retraction right and other moral rights, David Bainbridge, (2002) *Intellectual Property* London, Longman pp.115-116, Garnett. K. *et al Copinger and Skone James on Copyright, op cit* paragraphs 11-01 to 11-84 are quite detailed.

¹¹⁰ Section 32(3) Copyright Act of Kenya, Section 11(3) Nigerian Copyright Act, Section 20(2) Copyright Act of South Africa.

3.3.5. Copyright infringement and the music industry

Copyright owners have the exclusive rights to control the use of their works. In music, rights holders have the right to control the reproduction of their works in any manner or form. Any person who uses music or sound recordings without the authority of the rights holder infringes on the rights. The rights holder has the right to enforce his rights through civil action or criminal sanctions.¹¹¹

Commercial reproduction is prohibited without the rights holder's permission. Most legislation allows the reproduction of copyright protected works for personal use.¹¹² Rights holders also have the right to authorise or prohibit the commercial distribution of their works.

The sale, rental, hire or importation of protected music broadcasting, public performance and any form of communication to the public are the preserve of the rights holder.¹¹³ These provisions are meant to ensure that the rights holders are not unduly exploited by the activities of third parties. The exercise of these rights is not without exceptions and limitations laid out by the various laws.¹¹⁴ The provisions for

¹¹¹ Section 35 Copyright Act of Kenya, Section 14 Copyright Act of Nigeria and Section 23 Copyright Act of South Africa CPDA 1988 Chapter VI Section 96-100 Infringement is discussed in greater detail below. For civil remedies and criminal sanctions, see paragraph 4. 3.2.

¹¹² Reproduction for personal use is provided for under copyright law and does not amount to copyright infringement. However, this is limited to not more than three copies of the same work.

¹¹³ The right of reproduction is also granted to the producers of sound recordings. The reproduction of sound recordings in most cases will also amount to the reproduction of the underlying copyright works. The rights holders in the case of sound recording also have the exclusive rights of distribution, communication to the public, public performance as well as the broadcasting of their works. See Section 7 Botswana Copyright Act, Section 26(1) Copyright Act of Kenya, Section 5(1) (a), Copyright Act of Nigeria, Article 3 Copyright Act of Senegal, Article 31(a) Copyright Act of Mali, Section 8 Malawi Copyright Act, and Section 6 Copyright Act of South Africa. See also Section 9 Copyright Act of South Africa, Section 6 Copyright Act of Nigeria, Section 28 Copyright Act of Kenya, Section 7 Copyright Act of Botswana Article 31 Copyright Act of Senegal and Article 3 Copyright Act of Mali.

¹¹⁴ Article 10 Copyright Act of Senegal, Article 34 Copyright Act of Mali, Article 26(1) Copyright Act of Kenya, 2nd Schedule of the Nigerian Copyright Act, Part III Copyright Act of Botswana, Section 10 Copyright Act of Malawi.

infringement of copyright can be traced back to the Statute of Anne of 1710 in the United Kingdom. The Stationers' Company had the right to control the printing, reprinting and importation of books for a given period of time. During this time, if anyone exercised any of the above rights without the Stationers' authority, he would be penalised. There was a standard penalty of one penny for every sheet of infringing work, which was equally shared between the Crown and the author.

Infringing items were forfeited to the proprietor to dispose of them.¹¹⁵ Stationers had the power to impose fines, award damages and confiscate infringing copies.¹¹⁶ Infringement provisions have been adopted in subsequent legislation and have also expanded with the expansion of the scope of rights and rights holders.

¹¹⁵ Bainbridge. D. *Intellectual Property*, *op cit*, p.30.

¹¹⁶ *Ibid.*

Preceding paragraphs have briefly outlined the exclusive rights granted by copyright law to rights holders. Infringement of copyright can give rise to both civil and criminal liability. Laws in several countries in sub Saharan Africa provide for both.

Infringement is the dealing with copyright protected material in a manner that is inconsistent with the copyright holder's interests. It occurs where a third party exercises any of the exclusive rights granted to the rights holder without his authority.¹¹⁷ Infringement can either be a civil wrong, criminal offence or both and attracts both civil remedies and criminal sanctions.¹¹⁸ This could either be primary or secondary infringement. Primary or direct infringement involves the unauthorised reproduction of music in whole. The main infringing activity involves unauthorised reproduction of music in any material form.¹¹⁹ Secondary infringement occurs when certain acts are done without the authority of the rights holders in connection with primary infringement of copyright. This includes the dealing with infringing copies of a work and the second is permitting an infringing performance to take place.¹²⁰

It is important to note that all acts of unauthorised commercial use as described in paragraph 2.5.1 amount to infringement of copyright but not all acts of infringement as defined by law amount to unauthorised commercial use. There are instances where copyright infringement does not amount to unauthorised commercial use. In such cases, the courts consider whether or not a substantial part of the work taken

¹¹⁷ Sihanya, B. *Constructing Copyright and Literary Creativity in Kenya*, *op cit* p. 89.

¹¹⁸ Section 35 Copyright Act of Kenya, Section 14 Copyright Act of Nigeria and Section 23 Copyright Act of South Africa CPDA 1988 Chapter VI Section 96-100 Infringement is discussed in greater detail below. For civil remedies and criminal sanctions, see paragraph 4.3.2 and Chapter 5 and 6 below.

¹¹⁹ Section 23, Copyright Act of South Africa, Section 35(1), Copyright Act of Kenya, Section 14(1) of the Copyright Act of Nigeria, Article 3(b) (4) of the Copyright Act of Senegal and Article 31 of the Copyright Act of Mali.

¹²⁰ Dean, O.H. *Handbook on South African Copyright Law*, *op cit*. p. 1-44.

contributes to the similarity between the original work and the infringing copy.¹²¹ The courts will also consider whether or not there was a casual connection.

In the Kenyan case of *Alternative Media Ltd v Safaricom Limited*,¹²² although this case involves infringement of artistic works, it gives an indication of how the Kenyan courts interpret the law and use the foreign authorities to support their case. In this case, the Court held that although there was a glaring difference between the copyright work and the infringing copy, there was evidence that the infringing work was derived from the original work, as the defendant was privy to the original work prior to the infringement.

It will be interesting to see how they will deal with cases of the music copyright infringement. This brings up the issue of casual connection. The court in Nigeria in determining the degree of similarity that would give rise to casual connection reasoned as hereunder;

“...The answer can only be reached by a judgement of fact on a number of composite elements. The degree of familiarity) if proved at all, or properly inferred) with the plaintiff's work the character of the work, particularly its inherent probability that such similarity as if found could be due to coincidence, the existence of other influences on the defendant composer, and not least the quality of the defendant composer's own evidence on the presence or otherwise in his mind of the plaintiff's work.”¹²³

¹²¹ *Alternative Media Ltd v. Safaricom limited* eKLR p.18, *Hallmark Cards Inc& Others v Prima Toys (Pty) Ltd* 219 JOC See also Asein. J. *Nigerian Copyright Law and Practice op cit* p.108. Although this case involves infringement of artistic works, it gives an indication of how the Kenyan courts interpret the law and use the foreign authorities to support their case.

¹²² *Alternative Media Ltd v Safaricom Limited* eKLR. p. 18.

¹²³ *American Motion Pictures Export (Africa) inc. v Sounds of Music Ltd* (Suit No. FHC/L/40/81.

The South African courts consolidated this position; courts consider whether or not a substantial part of the work taken contributes to the similarity between the original work and the infringing copy.¹²⁴

From the forgoing, it is notable that there are certain elements that courts take into account when determining cases of primary infringements in relation to reproduction. For the infringement of the right of reproduction, two elements have to be established, one there must be a sufficient degree of similarity between the original and the alleged infringing copy, and there must be a casual connection between the two. Ignorance is no excuse for subconscious copying and indirect copying will also amount to copyright infringement.

Primary civil infringement involves the actual copying or unauthorised dealing in contravention of the provisions of the Copyright Act. In music, it occurs where an unauthorised third part does any of the following acts: One, where a third party does or facilitates the unauthorised use of music. Two imports for commercial purposes unauthorised music. Three distributes within the country music known to be infringing and four, communication of the work to the public.¹²⁵ Primary or direct infringement occurs when there is unauthorised reproduction, distribution, and rental, communication of the protected music as well as unauthorised translations and adaptations. The main infringing activity involves the unauthorised reproduction of the music in any material form.¹²⁶

¹²⁴ *Galago Publishers (Pty) Ltd and Another v Erasmus* [1989] 1 SA 276(A) 28Q.

¹²⁵ Section 23 Copyright Act of South Africa, Section 35(1) Copyright Act of Kenya, Section 14(1) of the Copyright Act of Nigeria, Article 3(b) (4) Copyright Act of Senegal and Article 31 Copyright Act of Mali.

¹²⁶ This includes CDs, VCDs, Music Cassettes, Digital copies on the computer and other such devices.

The other area that the courts have to contend with is the use of sections of a musical work or a sound recording for ring tones. The ring tones are created using a portion of the musical work to give rise to an original work for instance the polyphonic ring tones. It may also use a section of the sound recording without any alterations.

The author is of the considered opinion that the general rules outlined above should be used as guidelines to determine the cases.¹²⁷

Primary infringement of musical works also occurs where there is unauthorised public performance communication to the public or broadcast of the work.¹²⁸ This is type of infringement is common where users such as the broadcasting stations and entertainment ventures broadcast or communicate the works to the public without taking out licenses with the right holders through their collective management organisations. In 2002 the Copyright Act of South Africa included a section that required the users to obtain licences from the right holders for the public performance of their sound recordings.¹²⁹

Most of the infringing reproductions have been done on music cassettes, which are cheap and easily available in sub Saharan Africa. It is not until recently that reproduction on CDs and other digital media has become common.¹³⁰ Reproduction involved the creation of one or more copies of the original.¹³¹ The copy must have

¹²⁷ For more comprehensive discussions on infringement based on the right of reproduction see Garnett. K *et al Copinger and Skone Jones on Copyright*, p 369-392, 409, Asein. J. *Nigerian Copyright Law and Practice. op cit*, pp. 104-120, Dean O.H. *Handbook on South African Copyright Law, op cit*. pp. 1-39-1-44.

¹²⁸ Section 35(1) Copyright Act of Kenya, Section 23(1) Copyright Act of South Africa, Section 14(1) Copyright Act of Nigeria, Article 3(b) (4) Copyright Act of Senegal and Article 31 Copyright Act of Mali.

¹²⁹ Section 9A Copyright Act of South Africa.

¹³⁰ See Chapter 2.

¹³¹ Section 39(1) Copyright Act of Nigeria, Section 2 Copyright Act of Kenya, Section 1 Copyright Act of South Africa. The Copyright laws in Mali and Senegal do not expressly define reproduction but

been derived from the original, as there are instances where the similarity between the works may be attributed to the use of a common source.

However, with the advent of digital technology there may be instances where two works may be created independently of each other but based on the same digital programme.¹³² The courts seem to have foreseen such issues and held that an infringement of copyright in music is not a question of note for note copying but whether the substance of the original work was taken or not.¹³³

The publication of musical works by third parties without the authorisation of the rights holder also amounts to primary infringement. Publication here connotes the act of making available to the public including through the retailer.¹³⁴ This covers sale as well as rental or hiring of music. The acts discussed in the preceding paragraphs may also give rise to criminal liability.¹³⁵

These prohibited acts include the importation, sale, distribution or commercial exploitation of copyright works in violation of the existing copyright law.¹³⁶ In Nigeria, Kenya and South Africa, acts that constitute criminal infringement are comparable to those of secondary infringement under civil liability. The above laws further criminalise the act of causing the unauthorised public performance of a

clearly make it against the law to reproduce copyright protected works without the right holder's authority.

¹³² This is quite common with the new generation hip-hop music around the continent such as *Kwaito* in South Africa, *Kapuka* in Kenya and *Highlife* in Ghana.

¹³³ *Alternative Media Ltd v Safaricom limited* eKLR p.18, *Hallmark Cards Inc & Others v Prima Toys (Pty) Ltd* 219 JOC.

¹³⁴ Section 30(6) Copyright Act of Kenya Publication here is defined in relation to the rights of the performers. A published edition under Section 1 of the Copyright Act of South Africa means the first print of a particular typographical arrangement of a literary or musical work.

¹³⁵ Section 38 Copyright Act of Kenya, Section 18 Copyright Act of Nigeria, Section 44 Copyright Act of South Africa, Article 46 Copyright Act of Senegal and Article 87 Copyright Act of Mali.

¹³⁶ *Ibid.*

musical work as well as the possession of contrivances used for making infringing copies.¹³⁷

In Senegal and Mali, the offence is constructed within the meaning of the Penal Code.¹³⁸ The Counterfeit of Goods Act in South Africa criminalises the possession, manufacture, commercial exploitation in any form, public exhibition or importation of counterfeit goods.¹³⁹

Reproduction is treated as civil infringement. However, the law in Senegal also criminalises the reproduction of copyright protected works.¹⁴⁰ The common law jurisdictions seem to favour the inclusion of criminal provisions in the copyright law while the civil law jurisdictions still provide for the criminalisation through the Criminal or Penal Code. This as will be discussed in paragraph 4.3.2 has an impact on enforcement of copyright law. As in secondary infringement, guilty knowledge by the infringer is essential in the determination of infringement cases.¹⁴¹

Although the laws make it a criminal offence to infringe on copyright, there are few cases that have been determined by the criminal courts. This as will be discussed in 4.2.3 has a negative impact on enforcement of law as it contributes to the societal attitudes on copyright. In Kenya for instance, very few criminal cases have been

¹³⁷ Section 27(2) and Section 27(3) Copyright Act of South Africa, Section 38(1) (f) and Section 38(2) Copyright Act of Kenya and Section 14(1) (e) and 14(1) (f) Nigerian Copyright Act.

¹³⁸ Nigeria, prior to the 1988 Act also relied on the Criminal Code for the criminal provisions of copyright infringement. See Asein, J. *Nigerian Copyright Law and Practice*. *op cit*. pp. 134-135.

¹³⁹ Section 2 Counterfeit of Goods Act of South Africa.

¹⁴⁰ Article 46 Copyright Act of Senegal and Article 87 Copyright Act of Mali.

¹⁴¹ Section 38(1) Copyright Act of Kenya, Section 18(1) Nigerian Copyright Act, Section 2(2) Counterfeit of Goods Act of South Africa. In South Africa, the test for guilty knowledge is subjective and requires *dolus* on the part of the accused and not *culpa*. For further discussion on the South African position see Dean, O.H. Handbook on South African Copyright Law. *op cit*, p. 1-48. See also Asein J. *Nigerian Copyright Law and Practice*, *op cit*, pp. 134-138 on Nigerian Copyright Law.

successfully prosecuted and where a conviction is secured, the infringers get light fines and no custodial sentence has ever been given by the courts.

The rights holders feel that this creates an attitude especially among the users who have nothing to stop them from infringing of copyright. In South Africa as will be illustrated below has very few cases that are prosecuted and no custodial sentences either. Copyright in a sound recording shall not be considered infringed in certain circumstances set out by the law. These special exceptions are found in the South African and Nigerian copyright laws.¹⁴²

This in effect means that the owners of copyright in the music contained in the sound recording cannot sue the third party for copyright infringement but the owner of the sound recording can. Rights holders in sound recordings retain the exclusive rights granted by law subject to general exceptions and limitations such as fair use. This creates an interesting scenario where the rights holder in the sound recording has legal recourse but not the owners of the copyright contained therein. The rights holder in the musical works will however be entitled to royalties accrued from the commercial use of the musical work.¹⁴³

The inclusion of this provision in law allows the dissemination of works especially in cases where the person gave notice to the rights holder of his intention to make a reproduce the works.

Where the works were initially available in the market but the rights holder is no longer able to make them available, the provision would apply. One of the reasons

¹⁴² Section 14 Copyright Act of South Africa and Third Schedule of the Nigerian Copyright Act.

¹⁴³ *Ibid.*

why these provisions were made is that the law tends to treat the musical and literary works together and whatever right accrue to one will be applicable to the other. While this provision may have been appropriate for the literary industry, the author doubts its suitability in the music industry given the nature of musical works and the complex nature of rights in any given musical works.¹⁴⁴

There are other general exceptions and limitations under copyright law to the exclusive rights granted by copyright laws. An act will not be considered infringing if it is for purposes of fair dealing. This includes the use of the work for private research, study or private use, criticism or purposes of reporting news, use for judicial proceedings, quotations as well as ephemeral copies.¹⁴⁵ In Kenya, South Africa and Nigeria, mechanical rights in a sound recording are not infringed by making a sound recording or a copy of the work, or adaptation thereof if copies of the work had previously been made or imported into the country for purposes of sale or with the rights owners licence.¹⁴⁶ Where the works were initially available in the market but the rights holder is no longer able to make them available, the provision would apply.¹⁴⁷

¹⁴⁵ See Section 26 of the Copyright Act of Kenya, Section 12 of the Copyright Act of South Africa, Article 10 of the Copyright Act of Senegal.

¹⁴⁶ It effectively means that the owners of copyright in the music contained in the sound recording cannot sue the third party for copyright infringement but the owner of the sound recording can. Rights holders in sound recordings retain the exclusive rights granted by law subject to general exceptions and limitations such as fair use. This creates an interesting scenario where the rights holder in the sound recording has legal recourse but not the owners of the copyright contained therein. The rights holder in the musical works will however be entitled to royalties accrued from the commercial use of the musical work.¹⁴⁶ Inclusion of this provision in law allows the dissemination of works especially in cases where the person gave notice to the rights holder of his intention to make a replica. Section 14 of the Copyright Act of South Africa and Section 28(6) of the Copyright Act of Kenya and Third Schedule of the Nigerian Copyright Act.

¹⁴⁷ One of the reasons why these provisions were made is that the law tends to treat the musical along with literary works together and whatever rights accrue to one will be applicable to the other. While this provision may have been appropriate for the literary industry, the author doubts its suitability in the music industry given the nature of musical works and the complex nature of rights in any given musical works. In the case of literary works, the provision would allow the access to books and other literary

Works in the public domain are excluded from copyright protection. One question that needs to be addressed is the issue of music recorded from traditional cultural expressions. It is notable that most laws do not have specific provisions for the protection of traditional cultural expressions as these are not considered within the realm of copyright. The countries under study are currently engaged in national, regional and international consultations on protection of traditional knowledge and traditional cultural expressions.¹⁴⁸

3.4 Summary and Conclusion

Copyright law in Africa has been anything but home-grown. There are various external factors as discussed in previous paragraphs that have contributed to the current legal regimes. There are scholars who argue that copyright law in Africa is alien and reflects the ideologies of the “Western” world.¹⁴⁹ Copyright law was imposed and did not take into consideration any of the prevailing local circumstances. If we take the example of the Berne Convention, various countries in Europe already had their own domestic laws and needed to protect their works beyond their national borders. The Berne Convention inevitably encompassed the legal provisions that were

material that would otherwise not be available where the right holder has failed to grant a licence etc. See the Annex to the Berne Convention as incorporated into the TRIPS Agreement.

¹⁴⁸ For more in this process see the World Intellectual Property Organisation Intergovernmental Committee on Traditional Knowledge, Genetic Resources and Folklore available online at: <http://www.wipo.int/tk/en/igc/>.

¹⁴⁹ See Alan Story (2003) Burn Berne: Why the Leading International Copyright Convention Must be Repealed. *Houston Law Review* Vol. 40 (3) 2003, 763-801, Peter M Gerhart. (2000). Why Lawmaking for Global Intellectual Property Is Unbalanced, 22 *E.I.P.R.* pp.309-310.

contained in the then UK, French, German and other continental legal copyright laws.¹⁵⁰ It was a reflection of the existing laws.

The developing countries had to internalise the Berne Convention through the TRIPs Agreement that made it compulsory for them to do so. Failure of which would result in trade sanctions. The “later developers” like the United States and Japan took their time in ratifying the treaty. And even when the United States ratified the Berne Convention in 1989, more than 100 years after it came into being, they did it in their own terms.

Existing international laws and the enactment of new international norms were shaped by technological changes as well as the needs of copyright industries within the developed countries such as the United States and Western European countries. For African countries, the situation is different; the international laws to a great extent influence their national laws.

As was stated in previous paragraphs, national laws in Africa borrowed heavily from foreign as well as international laws. However, the process of amending and changing the laws has also been influenced by the emerging local needs within the various copyright industries, particularly the music industry. This was illustrated by the case of Nigeria, which ensured that copyright law responds to the needs of local rights holders. While some laws have been passed to conform to the international pressure, others, as we shall see in the following chapters, were passed in response to the local

¹⁵⁰ Lyman Ray Patterson. (1968). *Copyright in Historical Perspective*. Vanderbilt University Press, S. Ricketson. S. (1999). ‘The Boundaries of Copyright; Its Proper Limitations and Exceptions: International Conventions and Treaties.’ *Intell.Prop Q.* 56-79. .

situation. The amendments and the enactment of new laws in Kenya, Nigeria and South Africa reflect the above.

The history of copyright protection has a bearing on enforcement of laws.¹⁵¹ Society responds differently to laws and rules that govern them and tend to be unwilling to enforce laws deemed not to be in their interest. This will be examined in greater detail in Paragraph 4.1 which explores the concept of enforcement, and factors that influence the enforcement of the laws. The main purpose of this chapter was to provide an overview of copyright and related rights in relation to sub Saharan Africa. This chapter has discussed how copyright has developed with respect to the music industry. With the aid of few decided cases, the chapter illustrates the difficulties in determining copyright cases in sub Saharan Africa. It provides a background as of the development of copyright law from an historical perspective.

Under copyright law, infringement that amounts to unauthorised commercial use involves the illegal reproduction, sale, distribution and importation of copyright protected works.

This includes reproduction in any manner or form such as illegal downloads of music. In countries such as Kenya and Nigeria, acts that constitute criminal infringement are comparable to those of secondary infringement under civil liability. Enforcement, as will be discussed in chapter 4 will be in relation to unauthorised commercial use of music in sub Saharan Africa.

¹⁵¹ See Chapter 4.

From the foregoing, we can see that the legal framework does exist for the protection of copyright holders including those in the music industry. Copyright law in sub Saharan Africa encompasses modern copyright law. The unauthorised exploitation of exclusive rights within the music industry continues to be a problem. The author has defined unauthorised commercial use in relation to copyright infringement.

In the following chapters, the author will discuss the civil and criminal remedies as well as administrative structures and procedures for copyright enforcement. Enforcement of laws is an issue, which shall be examined in detail in following chapters. The author shall in the next chapter analyse the concept of copyright enforcement in the music industry, legal provisions as well as the prevailing political, social and economic situation in sub Saharan Africa.

CHAPTER 4. EFFECTIVE ENFORCEMENT OF MUSIC COPYRIGHT IN SUB SAHARAN AFRICA: A THEORETICAL PERSPECTIVE

4.0 Introduction

Enforcement of copyright and related rights in most countries in sub Saharan Africa is not optimal and this has a negative impact on the development of copyright industries. The high levels of unauthorised commercial use within the music, film, and book publishing sectors attest to this. It is not for lack of legislation. Copyright laws in Africa have been in existence since the colonial era.¹⁵² The real issue is lack or limited enforcement of existing laws and the impact of copyright protection has yet to be felt in these countries especially in light of high levels of piracy.¹⁵³ The main purpose of this chapter is to try and conceptualise effective copyright enforcement, through a political, economic, social and technological analysis of factors that affect the enforcement of copyright in the music industry.¹⁵⁴

4.1 Concept of Enforcement in Copyright

4.1.1 What is enforcement?

There are philosophical, ethical, economic and legal definitions of enforcement. *Black's Law Dictionary* defines enforcement as the act or process of ensuring compliance with the law which includes:

- (a) The process of compelling the compliance with the law, mandate, command, decree or agreement;
- (b) The process by which violations are investigated;

¹⁵² See Paragraph 3.3.

¹⁵³ See Paragraph 2.5. and 3.3.5.

¹⁵⁴ It is important to note that the term infringement in this and subsequent chapters refers to acts of infringement that amount to piracy as discussed in 3.3.5 and 2.5.

- Police investigations
- Industry Organisations
- Public private partnerships

(c) The application of legal sanctions to the violator including:

- (i) Legal sanctions administered through administrative procedures,
- (ii) Civil remedies administered by courts including injunctions, Anton Piller orders and damages,
- (iii) Criminal sanctions administered by courts such as custodial sentences and fines.

(d) Use of preventative measures:

- (i) Public awareness and education,
- (ii) Use of interim measures to prevent further violations.

From the above definition, it is clear that enforcement is a process and requires the requisite institutional and administrative structures to ensure compliance. It could be specific in that it targets a particular group within society or it may be general. Sanctions can either be through the public sector for instance the police and the judicial system or it may be through private agencies or a combination of both as shall be discussed below. Enforcement requires relevant institutions to give force or effect of law by compelling obedience and requiring one to face the consequences for non-conformity.

One of the reasons given for the increased unauthorised commercial use of music was lack of enforcement.¹⁵⁵ It was established that unauthorised commercial use of music

¹⁵⁵ Paragraph 2.5.

amount to both criminal and civil infringement and emphasised that not all acts of infringement as defined by the law amount to unauthorised commercial use.

Unauthorised commercial use includes illegal, reproduction, importation, and sale or exposing for sale infringing copies of music. Enforcement of copyright in the music industry involves the following:

- (i) Formulation and enactment of written copyright law,¹⁵⁶
- (ii) Investigation of cases of unauthorised use of music. This as will be discussed in paragraph 5.1, 5.2 and 5.6 is done by the police and copyright inspectors as well as industry based organisations.
- (iii) Use of legal sanctions to stop unauthorised commercial use of music. This includes the use of civil remedies such as damages and injunctions as will be discussed in paragraph 6.2 to 6.4. It also involves the use of criminal sanctions such as fines and custodial sentences which will be discussed in greater detail in paragraph 6.6.
- (iv) Use of preventative measures such as court orders for injunctions, border measures, anti piracy security devices as well as technological protection measures.¹⁵⁷

4.1.2. Why Have Copyright Enforcement?

Theoretically, copyright law grants rights and provides for exclusive exploitation of the rights.¹⁵⁸ Once the law has been put in place, society is expected to abide by the same. In a perfect society, the mere existence of law would be sufficient to ensure

¹⁵⁶ Post infringement enforcement assumes that there is an enforceable copyright law. See Part 4 of CY564-Unctad -v1 UNCTAD document November 30, 2004.

¹⁵⁷ See paragraphs 5.3, 5.4, 6.2 and 6.3.

¹⁵⁸ *Ibid.*

conformity. It is assumed that society would be self-regulatory and adhere to law without supervision. However, since society is not perfect and there is a possibility of non-conformity, laws not only set out what constitutes an infringement of rights granted but also make provision for remedies and sanctions.

The life of the law is in its enforcement. Law without corresponding enforcement is of no use to those it seeks to protect.¹⁵⁹ This has been the case with regard to copyright protection in most of sub Saharan Africa.¹⁶⁰ Laws set rules and norms by which society should adhere to, but laws are not self-enforcement. To ensure enforcement, laws in addition to the above, should provide for the structures and mechanisms to ensure compliance. People governed by law must execute them through legal and administrative enforcement structures as will be discussed in Chapter 5 and 6.

Enforcement of law is part and parcel of any legal regime. Provisions exist within law to ensure that people conform to the laws. These provisions include remedies as well as sanctions such as damages, custodial sentences and fines. The threat of civil remedies and criminal sanctions that leads to restraint as well as deprivation is in many cases enough to induce one to conform and avoid breaking the law. From the fieldwork carried out in South Africa, Kenya and Nigeria, it was evident from the respondents that one of the reasons for unauthorised commercial use is lack of

¹⁵⁹ Roscoe Pound summed this as follows "For laws do not execute themselves. Human beings must execute them and there must be some motive setting the individual in motion to do this above and beyond the abstract content of the rule and its conformity to an ideal justice or an ideal social interest." Roscoe Pound. (1917). The Limits of Effective Legal Action, *International Journal of Ethics*, Vol. 27 No.2 January 1917, pp. 150-167.

¹⁶⁰ Copyright laws have been in place in most of sub Saharan Africa since the advent of the colonial era. For most countries, copyright owners have not benefited from copyright laws, as they have not been enforced. Until recently, in countries like Uganda, people assumed that there was no copyright law as the 1964 Act was considered outdated and did not provide for criminal sanctions. A new law was passed by parliament in 2006, which will hopefully remedy the situation. See paragraph 3.3.3.

enforcement of existing laws. The few cases that have been determined in criminal courts have not resulted in any custodial sentences while damages awarded in copyright cases are neither punitive nor deterrent.¹⁶¹

Enforcement in all areas of law is very important.¹⁶² Sanctions include deprivation of one's freedom, fines and or some form of physical punishment. The sanctions ensure that the majority within the society conform.

There is a small percentage who are not deterred and when caught face the consequences. In the case of copyright, legal provisions should ensure conformity to law and discourage infringement of the rights.

However, one might argue that people conform to the law not because of the consequences of non-conformity but because this would be deemed to be the right thing to do. The author contends that majority of the population is bound to conform, not because of the threat of sanctions for illegal activities but because they deem it proper to obey the copyright law like any other law.¹⁶³

In case of copyright, especially in developing countries, unauthorised commercial use of copyright especially in the music industry still goes on despite the law providing for sanctions and penalties. Most copyright laws clearly state what constitutes infringement and provide for civil as well as criminal sanctions for the non-

¹⁶¹ See Paragraph 6.1 to 6.6.

¹⁶² For instance, in contract law, a signed contract is enforceable by law and either party may seek legal redress in case of a breach of contract. The aggrieved party has the right to sue for the breach and even claim damages. Another good example is the Penal Code, which lays down the criminal offences and the penalties for committing those offences.

¹⁶³ This raises the issue of law and morality which would form the subject of a separate thesis.

conformists.¹⁶⁴ Copyright laws have been in place in most developing countries for over 20 years but this has not stemmed unauthorised commercial use.¹⁶⁵ From books to music, illegal copies dominate the market. However, the consequences for breaching the law in most cases are either non-existent or nominal.

Unfortunately, there are those who use copyright protected works and benefit from the same without authority of the rights holder. Such unauthorised use may be prejudicial to the economic interests of the rights holder as well as infringe on his moral rights. The situation has been made worse by new technologies that allow users to access works more easily and at nominal costs.¹⁶⁶

The rights holder would thus want to ensure that his interests are well protected from such misuse and seek to enforce his rights.

Under copyright law, there are clear provisions with regard to infringement of copyright and remedies available to rights holders.¹⁶⁷ Without enforcement mechanisms, unauthorised commercial use of music becomes the norm as infringers are unlikely to face severe repercussions, even though the law provides for protection of the rights.¹⁶⁸ Further, copyright falls under the realm of public goods. Several

¹⁶⁴ See copyright laws in the United Kingdom, The United States, Germany and Japan. International Conventions such as the Berne Convention, TRIPS Agreement WCT and WPPT all have provisions on the infringement of copyright and the penalties for non-infringement. This also applies to the Copyright Act of Kenya, South Africa, Senegal and Nigeria. They all have provisions for infringement and provide for both civil and criminal sanctions as discussed in Chapter 3 and Chapter 5.

¹⁶⁵ See paragraph 2.5. and 3.3.5.

¹⁶⁶ The recent US case of copyright infringement through the use of the peer-to-peer file sharing system is a good example. The defendant claimed that copies were downloaded for purposes of sampling to enable him choose what to purchase. The court in rejecting this defence found in favour of the claimant and awarded damages to the tune of US 22 500. *BMG Music V Gonzales* (430 F.3d 888 (7th Cir. 2005),

¹⁶⁷ This has been discussed extensively in chapter 3.

¹⁶⁸ Section 11 of the Copyright Act of Uganda 1964 provides for civil remedies in case of copyright infringement. It does not criminalise copyright infringement. The Act does not set any maximum or minimum penalties and the damages are to be determined by the court. Uganda recently passed the Copyright and Neighbouring Rights Act of 2006, repealing the 1964 Act. The new Act provides for

people can use music, watch a television broadcast read a book or use a computer programme at the same time without diminishing the value or denying others access to the goods. Once the initial works have been made, subsequent reproductions are sold, hired, broadcast, imported or communicated to the public.

In the music industry, there is a high propensity to use protected works without the authority of the rights holder.¹⁶⁹ Music has the potential of raising revenue for third parties without necessarily divesting the owner of the original item and is thus a favourite candidate for unauthorised use.

Enforcement of copyright is necessary to ensure that unauthorised third parties do not exploit exclusive rights at the expense of copyright owners. It is important to examine the core normative and institutional issues in the context of enforcement of copyright in the music industry.

4.2. A Critical Examination of the Core Normative and Institutional Issues in copyright enforcement in the Music Industry.

“Although the State makes the rules, there are norms and informal modes of behaviour that facilitate enforcement of laws. Equally important are the informal and often tacit rules that structure the social conduct. Formal rules....make up a small part of the sum of constraints that shape the

both civil remedies and criminal sanctions for copyright infringement. See The Uganda Gazette No. 47 Volume *XCIX* 4th August 2006.

¹⁶⁹ The respondents during the field study did not see anything wrong with copying music without the authority of the rights holder. Some were of the view that they were doing the rights holders a favour by disseminating the music. This is due to the public good nature of copyright.

choices...the governing structure is overwhelmingly defined by codes of conduct, norms of behaviour and conventions”¹⁷⁰

The State is responsible for enactment of legislation as well as provision of administrative and other institutional structures for proper administration of copyright law. In addition to legal and institutional structures, there are informal rules that regulate social conduct and behaviour. The author shall in the following sections critically examine the legal, institutional and social structures that influence the level of conformity to copyright law in relation to music. Conformity to the law has a bearing on enforcement of law especially in the field of copyright. If the system fails to ensure a high degree of conformity, it may be because of various factors, which include but are not limited to the following:

- (a) Legal Framework
- (b) Institutional Structures
- (c) Societal Perceptions of copyright
- (d) Technology
- (e) Political and Economic factors.

The author shall in the following paragraphs examine each of the above-mentioned factors and how they affect copyright enforcement in the music industry.

4.2.1 Legal Framework

“The problem of how to enforce the law is closely connected to the question of how far we style law and seek to give effect as law is capable of enforcement; as we look into the history of the subject we soon come to see much of this

¹⁷⁰ Douglas C. North. (1990). *Institutions, Institutional Change and Economic Performance*, Cambridge: Cambridge University Press p.36. The author does not ascribe to the New Institutional Economics. She however agrees with North in his analysis that laws, administrative structures and enforcement mechanisms are important in enforcement of law. Equally important are the social-cultural norms and attitudes within any given society.

problem of enforcing law is in reality a problem of the intrinsic limitations upon effective legal action. The law is a system of rules, the existence of which provides those subject to them with reason for conforming. Important to note that because something is required or omitted by the law will not be the only reason for the doing or omitting.”¹⁷¹

In paragraph 4.1 above, the author defines enforcement as a process by which violations are investigated and legal sanctions applied to the violator. This pre-supposes that there is a law in place. The law should provide for structures and processes as well as remedies to deal with those involved in unauthorised commercial use of music. The author will analyse the legal framework and how it affects enforcement of copyright in the music industry.

Earlier in paragraph 3.1, the author discussed the rationale for copyright protection under the two systems that influenced the development of copyright law in sub-Saharan Africa. The economic and natural rights analysis highlights controversies over the role of copyright in creative works. On one hand, there are those who see copyright as a tool for access to creative works while others see it as a means of providing incentives and rewards to authors.¹⁷² These are not easily determined as they are influenced by economic, cultural, political and technological factors.¹⁷³ The author contends that the philosophical underpinnings of copyright, as discussed in chapter 3, have a bearing on enforcement of copyright law.

¹⁷¹ Pound R. *supra*, footnote 8.

¹⁷² See paragraph 3.1

¹⁷³ See Bernard Sihanya, (2003) *Constructing Copyright and Literary Creativity in Kenya*. Unpublished Doctoral Thesis p.51.

Existence of law, which imposes a legal obligation, is necessary in any legal system. The law is a system of rules, the existence of which provides those subject to them with a reason to conform.¹⁷⁴ Since not everyone is sufficiently inspired to respect law, legal systems rely on sanctions to secure a sufficiently high level of conformity.¹⁷⁵ Copyright provides for this obligation on society to abide by the law, failure of which would amount to civil action or criminal sanctions.

Although most laws provide for both civil and criminal remedies, the criminal remedies are rarely applied. This gives the impression that unauthorised commercial use of music and other copyright material is not a serious matter. Where criminal penalties were provided for, they were neither deterrent nor punitive.¹⁷⁶

Copyright laws give those subject to it the choice to either abide or face the consequences. If the law does not give clear provisions for enforcement, society will not necessarily abide by the law. Copyright laws provide for criminal sanctions as well as civil remedies. Laws, prior to the TRIPS Agreement, had few or no enforcement provisions.¹⁷⁷ Given, they all make wilful infringement illegal and also provide for civil and criminal sanctions, what is conspicuously lacking is how to go about the enforcement. It is only after the TRIPS Agreement in 1994 that member countries decided to provide for effective enforcement of copyright laws.

¹⁷⁴ The function of a legal system to quote McNeilly is; "to provide those subject to it with an assurance of stability sufficient to permit of their having good reason to comply with its requirements." F. Mcneilly. (1968) *The Enforceability of the law. No&ucir*; Vol. 12 No. 1 February pp.47-64.

¹⁷⁵ *Ibid*

¹⁷⁶ See Directive 2004/48/EC of the European Parliament, which expressly provides for the harmonised civil remedies but leaves the matter of criminal sanctions to the various member states. There is a move to have harmonised criminal sanctions at the regional level. See proposal of the European Parliament and Council Directive on criminal measures aimed at ensuring the enforcement of intellectual property rights 2005. See paragraph 6.6.

¹⁷⁷ Kenya, Nigeria and South Africa can be noted to have laws that are in line with the Berne Convention. The Berne Convention did not have did not provide for specific enforcement mechanisms and this was left to the individual member states.

Copyright laws clearly define what infringement entails they also set out the consequences for infringement.¹⁷⁸ The law should be enforceable.¹⁷⁹

Provisions of law have to ensure that they do not leave loopholes that encourage third parties to engage in illegal activities. Loopholes in the legal provisions can have a negative effect on the enforcement process. Third parties take advantage of such situations to infringe upon existing rights knowing that they are not liable unless the legal regime is rectified.¹⁸⁰ The author contends that sanctions provided by law are not the reason why people abide by the law; they would still abide even if they knew that there were no sanctions for non-conformity.¹⁸¹

Society responds differently to laws as well as rules that govern it and is unwilling to enforce laws, which it deems to be of no benefit to the society or to be alien. Copyright laws in Africa were seen to be foreign and were for the benefit of the foreign rights holders.¹⁸² In paragraph 3.3.3, the author discussed the history and development of music copyright especially under the British and French Colonial rule where the copyright laws were applicable to the British or French subjects in the respective colonies. This perception was carried over to date. From the interviews with Mr. Oupa Lebogo of the then Musicians Union of South Africa (MUSA), it was evident that most of the users considered copyright laws foreign and did not see how they would benefit the local population. The Union had to create awareness for its

¹⁷⁸ See paragraph 3.3.5.

¹⁷⁹ In Austin's theory of law, *"It is a necessary condition of a rule of law that it should be enforceable. He views all law, "as command and what distinguishes commands from other expressions of desire such as a wish is the power and purpose of the commanding party to inflict evil and pain in the case the command is disregarded."*

¹⁸⁰ See Chapter 5 and Chapter 6 for practical examples.

¹⁸¹ The author shall not discuss the various schools of thought on the theory of law, as this would be subject to a separate research.

¹⁸² The laws were adopted as they applied in the home countries and were mainly to protect the rights of the settlers. See paragraph 3.3.3.

members on the importance of copyright and related rights.¹⁸³ Lack of Government policy on copyright further perpetuates this perception in sub Saharan countries like Kenya, Nigeria, South Africa and Senegal.

It is notable that most African countries did not accede to the Berne Convention until they were forced to conform to provisions found in the Convention through the TRIPS Agreement.¹⁸⁴ When drafting copyright laws, it is common for the governments in Africa to engage the services of experts from outside the continent. While this may be a bonus in terms of expertise in matters of copyright and related rights, their recommendations and findings are biased towards western ideologies along with economic interests.¹⁸⁵ However, this dependence is occasioned by lack of or limited expertise in the area of copyright and they have to rely on technical assistance in drafting laws, legal advice and expert opinion.¹⁸⁶

In sub Saharan Africa, the history of copyright law has contributed to the current state of copyright enforcement.¹⁸⁷ First, at independence, most countries in Africa simply carried over ordinances that existed during the colonial era and only changed the titles to reflect their political freedom.¹⁸⁸ Secondly, subsequent changes made to copyright law was in response to pressure to ratify existing international conventions. These

¹⁸³ Interview with Mr. Oupa Lebogo, General Secretary, Musicians' Union of South Africa in November 2005 Pretoria, South Africa.

¹⁸⁴ See Article 9 TRIPS Agreement.

¹⁸⁵ Sihanya B. *supra*, footnote 21.

¹⁸⁶ M. Leesti and T. Pengelly. (2002) 'Institutional Issues for Developing Countries in Intellectual Policymaking, Administration and Enforcement' paper prepared for the Commission on Intellectual Property Rights Study Paper 9. p.21 available online at http://www.iprcommission.org/graphic/documents/study_papers.htm. It is important to note that in countries like Kenya and Nigeria, Universities have introduced teaching of intellectual property rights and there are more professionals getting trained in the area.

¹⁸⁷ See paragraph 3.3.

¹⁸⁸ The Copyright Act of Uganda of 1964, the Copyright Act of Kenya of 1966 and the Copyright Act of Ghana of 1961 were all renamed from the previous ordinances that were based on the United Kingdom Copyright Act of 1956. Not much was done to change the content except for Nigeria, which tried to amend the law to suit the local situation.

amendments did not take into account prevailing circumstances within African countries and were largely based on the interests of the industries in developed countries.¹⁸⁹

Changes brought about by the TRIPS Agreement were to ensure that copyright laws were in conformity with the Agreement, failure of which would result in economic sanctions within the World Trade Organisation (WTO) framework. Being member states of the WTO, the African countries had no choice but to make the required changes. Third, the contribution by the authors within the industry has been minimal.¹⁹⁰ Investors within the music industry have a bigger say as they try to press for laws that protect their investments. This may be attributed to commercialisation of music. Copyright is treated like any other moveable property.¹⁹¹ Furthermore, the authors' participation in the law making process is limited.

The author contends that in countries where copyright laws and enforcement regimes are "home-grown," unauthorised commercial use is less. The United Kingdom, the United States, France and Germany all seem to have relatively lower levels of unauthorised commercial use especially in the music industry as most users are willing to purchase copyright protected products especially music. Unauthorised use, such as peer-to-peer file sharing system has changed this but one might argue that the persons engaged in this kind of activity were unlikely to have purchased the legitimate copies in the first place. Provision for infringement, remedies and penalties requires

¹⁸⁹ The Berne Convention is an example of an international convention that reflected the laws of the "Western" countries such as France and the United Kingdom. See Alan Story, *Why the Leading International Copyright Convention Must be Repealed*. *op cit.* p.795.

¹⁹⁰ The author in this context means the person who created the work such as literary authors, music composers, visual artists etc.

¹⁹¹ See Section 10 Nigerian Copyright Law and Section 33 Kenyan Copyright Law.

institutions together with procedures to ensure that copyright law is respected. Institutions charged with the responsibility of enforcing law cannot work in a legal vacuum.

They have to draw their powers from existing laws. Public enforcement agencies like customs and police require a legal mandate to carry out their duties such as inspection, seizures and arrests.

In Kenya, customs officials for a long while shunned copyright infringement cases on grounds that there was no specific provision in the Customs and Excise Act that granted them powers to seize and stop infringing goods from getting into the country. According to Mr. David Ontweka, an Assistant Commissioner, Legal Department of the Kenya Revenue Authority (KRA), this provision was crucial. Where these powers are not included in law, the enforcement process is likely to be hampered.¹⁹² The TRIPS Agreement requires member states to provide quick and expeditious remedies; granting these agencies powers especially *ex officio* powers to deal with copyright infringement is essential. Laws are meant to provide the basic structure for administration and enforcement.

Lack of formalities such as, a prerequisite to the subsistence, enjoyment, exercise, protection, and enforcement of copyright, has a bearing on the level of enforcement. The absence of a registration certificate as proof of ownership creates a problem where infringement occurs. In Kenya, South Africa and Nigeria, it is notable that in copyright infringement cases, the rights holder is deemed to be the copyright owner unless the defendant raises the issue of ownership. Thus it places the burden of proof

¹⁹² See Paragraph 5.4 below.

on the rights holder. According to Mr. Japheth Kasanga and Ms Julie Gill of the Kenya Association of Music Producers (KAMP), this creates a problem as it is difficult to convince the court and they have on several occasions lost the cases.

For efficient enforcement of copyright and related rights, at the level of formulation and enactment the law should ensure that:

- (a) It is clear on what constitutes an infringement and provide for the appropriate remedies as well as penalties as discussed in paragraph 2.5 together with paragraph 3.3.5.
- (b) Outline the role of the various institutions such as the police, and customs in relation to the sanctions and remedies offered by the law.¹⁹³
- (c) Provide for mechanisms where violators are penalised for their transgressions and the rights holders are adequately compensated.¹⁹⁴
- (d) It should provide for preventative measures.
- (e) It should reflect the will of those it seeks to protect
- (f) It should be grounded on existing policy on copyright and related rights

4.2.2 Institutional Structures

Existence of structures to execute law is another important aspect. Institutions play three roles; first, they make the laws that govern copyright and related rights enforceable. Through these institutions, rights holders and users come to know about existing laws. Secondly, institutions like courts create and regulate rules through interpretation of existing laws or by setting standards in hand with principles on

¹⁹³ See Paragraph 5.1 to paragraph 5.4.

¹⁹⁴ See paragraph 4.3.2.

various laws and practices.¹⁹⁵ Thirdly, they, as stated in the previous paragraph, provide those who are subject to them with reason to conform to the laws. These structures as discussed further on could either be private or public agencies.¹⁹⁶

These institutions are part of the enforcement process as they are the ones that:

- (i) Implement the existing laws through investigations of the violations. These include public institutions such as the police and copyright offices as well as the private institutions such as the industry organisations.¹⁹⁷
- (ii) Administer civil remedies such as the law courts.
- (iii) Apprehend and prosecute of those who violate copyright law by prosecutors and courts.¹⁹⁸
- (iv) Implement preventative measures such as customs, copyright offices and courts.

The author looks at institutions in terms of administrative and enforcement structures such as copyright offices, collective management societies, courts, police, customs, industry organisations and other law enforcement agencies both in the public and private sector. The institutional framework creates an opportunity for rights holders to

¹⁹⁵ This is true in common law systems where the legal precedents are used to determine cases. In Kenya and Nigeria, the courts will refer to previous case law when deciding cases. See Chapter 6. In some jurisdictions like the United States and the United Kingdom, Courts are instrumental in formulation of copyright policy through their judgments.

¹⁹⁶ Eric. Brousseau, (2005). Christian 'Public and Private Institutions in the governance of Intellectual Property Rights', in B. Andersen. (ed), *Intellectual Property Rights, Innovation, Governance and the Institutional Environment*, Edward Elgar Publishers. Available at <http://www.brousseau.info/pdf/2004-CBEB-Andersen.IPRPubPriv.pdf>. The authors give an analytical framework of public and private institutions. They view institutions as a combination of rules and institutional organisations that impose constraints on third parties to ensure that they do not infringe on the existing rights and penalise them when they do. This goes into the realm of Institutional Economics of which the author does not wish to delve into.

¹⁹⁷ Paragraph 4.4.1 and Chapter 5.

¹⁹⁸ See Chapter 6.

ensure that their rights are not subject to unauthorised commercial use by third parties. Where third parties infringe upon the works, these institutions are meant to have mechanisms to penalise them and see that rights holders are compensated for infringement and where necessary punished for violation of copyright.¹⁹⁹ How these agencies execute the above is quite crucial as well as their ability to deal with various infringers and bring them to justice. This was well captured by two scholars as hereunder:

“A necessary condition for the efficient use of resources is the definition of the exclusive rights of uses over them...aimed at avoiding conflicts and at providing incentives to create and use them efficiently... and enabling agents to transfer these rights at a low cost to allow efficient relocation. The general institutions of the society play an essential role in settling these rights. However, economic agents must always dedicate resources and efforts to set the boundaries of their rights of use and to exclude unauthorised parties from access to “their” resources. This leads them to build devices aimed at governing their rights of access and of use to minimise costs.”²⁰⁰

Public agencies draw their enforcement mandate from copyright law or from other existing laws such as the Penal Code, the Customs and Excise Act, the Trade Descriptions Act among others. Public institutions are seen as the centre of copyright enforcement. Emphasis is made on the role of government institutions and their inability to enforce copyright laws in sub Saharan Africa.²⁰¹

¹⁹⁹ This is discussed in greater detail in Chapter 5 and Chapter 6.

²⁰⁰ Brousseau E, *supra*, footnote 45.

²⁰¹ See Chapter 5.

Public agencies are considered inefficient in copyright enforcement, as they tend to be slow and concentrate more on determination of “more serious” matters.²⁰² Civil cases take long before they are determined. Rights holders prefer where possible to institute criminal proceedings as these are finalised in months.

Execution of copyright laws by public enforcement agencies will depend on various factors. First, is the resources available within the agency, structure and capacity; this is a problem especially in developing countries where public resources are often stretched and limited. Second, is the willingness of enforcement agencies in executing the law, which brings us to the issue of the Government policy on the enforcement of copyright and related rights. It is notable that several governments in sub Saharan Africa do not have clear policies on administration of copyright and related rights. As a consequence, there are no copyright enforcement policies.²⁰³

Third is the level of corruption; high levels of corruption as we shall see in paragraph 6.7, especially within the Judiciary are an impediment to enforcement of not only copyright but other statutory rights as well.²⁰⁴

From the foregoing, it is clear that for effective enforcement, several institutions are required to at the various stages of enforcement as discussed in paragraph 4.1.1. The author contends that institutions charged with enforcement of copyright should be established based on the social, political and economic needs of local industries as

²⁰² See paragraph 4.4.1.

²⁰³ In Nigeria, the cultural policy exists but the implementation of the systemised cultural policy or the core aims of the policies within the states is yet to be accomplished. See Nzewi. O, (2003) “The Effects of Globalisation on the Nigerian Music Scene”, A Report for the ManyMusics Project of the International Music Council, October 2003. Kenya on the other hand just recently started working on the IP policy (Concerted effort between the Ministry of Trade, Office of the Attorney General, the Academic community and stakeholders from the IP industry).

²⁰⁴ See paragraph 6.7.5 below.

opposed to adopting systems from other jurisdictions.²⁰⁵ These should however be in line with the provisions of the TRIPS Agreement to ensure expedient and effective relief to the rights holders.

4.2.3. Societal Perceptions and Enforcement of Copyright

The State makes laws and provides the institutional framework within which these laws can be administered and enforced.²⁰⁶ The codes of conduct and norms of behaviour within a given society are equally important in ensuring the efficacy of laws. Although copyright like other intellectual property rights are statutory rights, societal perceptions in relation to copyright and law enforcement in general affect the level of enforcement.

The following paragraphs shall examine the societal perceptions in relation to copyright law, music and the protection of music under copyright law, enforcement provisions within the law, institutions that enforce copyright, sanctions and penalties for the unauthorised use of copyright as well as the music industry.

Society has different perceptions in relation to law, subject of protection and enforcement procedures. There are societal factors that affect enforcement of rights especially in the field of copyright. How the society views copyright and related rights is central to the enforcement of these rights. The society may view law as authoritative and controlling.²⁰⁷ In which case, non-conformity would lead to severe

²⁰⁵ These, under the World Trade Organisation framework need to provide for the minimum measures provided by TRIPS.

²⁰⁶ See paragraph 4.2.1 and 4.2.2 above.

²⁰⁷ "It is often assumed that the authority of the law is to be understood in terms of values. Certain ends are desirable; certain values ought to be preserved; the law is the instrument by which society preserves and enlarges its values. A society comes to be what it is as a consequence of beliefs about what ought

deprivation. In such cases, society has no choice but to abide by law or face the consequences.

Acceptance of authority and susceptibility to moral pressure are important factors in enforcement of law.²⁰⁸ If society does not accept law and is not morally bound to adhere to it then there will be no enforcement.

Copyright presents an interesting case. By its very nature, it is an intangible property as well as a public good.²⁰⁹ The initial costs of creating works might be high but subsequent reproductions incur nominal costs. Unauthorised commercial reproduction is thus not seen as a violation of any rights. Society does not view infringement as a crime or civil transgression of one's rights. How is copyright law as it relates to music perceived by the society? The concept of copyright being a proprietary right is quite alien and most users believe that they can use protected works without necessarily compensating the rights holder.

The nature of penalties plays a crucial role in determining the level of conformity to law. Where penalties are nominal or non deterrent, then society tends to view it as a minor offence and consider the penalties a small price to pay. From an economic perspective, the violator weighs the risk of getting apprehended against the benefit of committing the unauthorised act. Unauthorised commercial use is likely to occur

to be." See Samuel L.Thomson, (1964). The Authority of the Law *Ethics*, Vol. 75, No. 1 (October 1964), pp.16-24 available at: <http://uk.jstor.org/> (last accessed 5 September 2005.)

²⁰⁸ Laswell H. Dwight, (1992). *Jurisprudence for a Free Society* New Haven: New Haven Press. pp. 362-365.

²⁰⁹ Public goods have two characteristics; they are non-rival and non-exclusive. Although the initial costs of production might be high subsequent costs are minimal and can be produced at a marginal cost.

where the risk of getting apprehended and sanctions or penalties applied are lower than the benefit accrued from committing the unauthorised act.

The likelihood of being caught and convicted is almost zero.²¹⁰ And if convicted, the likelihood of getting the maximum sentence is even more remote.²¹¹ This is true in countries like Kenya, Nigeria and South Africa. In 2000, there were 177 raids conducted. Only 18 resulted in court cases. 13 of these resulted in criminal fines of a total of UK£ 600.²¹² In civil cases, the civil sanctions rarely compensate the rights holder and the court processes are too slow. From the foregoing, it is clear that fines are a cheap price to pay. If on the other hand, the risk of getting apprehended is higher than the perceived gains from the infringement, then he is unlikely to break the law.²¹³

The law has to provide people with a reason to conform and if it lacks this, then society is unlikely to adhere by the law.²¹⁴ In civil cases, the damages payable have to be substantial. In the recent case of *BMG Music v. Gonzalez* the US 7th Circuit Court awarded damages to the rights holder for end user piracy.²¹⁵ The defendant was an individual who downloaded music using the Kazaa file sharing system. Damages awarded amounted to US\$ 22 500. The damages seemed quite high for an individual end user but the case certainly sent a message that the illegal downloads of music would be and are punishable by law. Once this message is clear to the society, the author is of the opinion that the incidence of copyright infringement is likely to

²¹⁰ Jeremy Phillips J. (2001). The Risk That Rewards: Copyright Infringement Today. *Ent. L.R* 12(4) pp.103-106.

²¹¹ *Ibid*.

²¹² See IIPA Report 2003 Special 301. This is discussed in greater detail in Chapter 5.

²¹³ S. Shavell (2003) Economic "Analysis of Public Enforcement and Criminal Law" Working Paper 9698 NBER working paper series May 2003 available at <http://www.nber.org/papers/w9698>.

²¹⁴ See paragraph 4.1.1. which clearly states that enforcement is the process by which violations are investigated and legal sanctions applied to the violator.

²¹⁵ *BMG Music v Gonzalez* 430 F.3d 888 (7th Cir. 2005).

decrease, as the risk of getting caught and fined is a reality. It might not necessarily put a stop to the infringing acts across the board but it will reduce incidences of the same.

Civil remedies have to be fast and effective to compensate the rights holder as well as prevent any further acts that amount to unauthorised commercial use. Copyright infringement in music is not viewed as a serious offence both by law enforcement agencies and users of copyright. In fact, it is viewed as a “victimless crime”. This might explain the dearth of copyright infringement cases tried before criminal courts or suits that are brought before courts. Law enforcement agencies as will be discussed in Chapter 5 find it a minor offence and penalties awarded if any are nominal. Where the benefits and convenience from infringements are high but the risk of retribution is low, people will opt to infringe on copyright.²¹⁶ In some cases, the society may view copyright law as an impediment to dissemination of information. Discrepancy in what the law states and what happens in practice contributes to the way society views laws, which in turn affects the level of conformity. Where law and practice are different, there is a tendency for those subject to it not to take it seriously.²¹⁷

There are instances where law exists and is not implemented for one reason or the other. It could be lack of institutional capacity to implement the law or the government might not consider it a priority. People subject to the law are likely to assume its importance. The likelihood of people failing to adhere to the law is higher as there are no mechanisms to ensure compliance. Failure by the Government to provide mechanisms for enforcement of copyright law will have an effect on the

²¹⁶Jeremy Phillips *supra*, footnote 54.

²¹⁷ See paragraph 6.7 below.

attitude of the society to the copyright law. If the system of enforcement is not well designed, many people will not take it seriously.

Similarly, if the system is wrought with malpractices such as corruption, then society does not treat unauthorised commercial use of music as a serious crime or civil transgression.²¹⁸

The unauthorised third parties are not punished and it is difficult for the rights holder to be compensated through the legal system. There is a tendency for society not to view copyright infringement as a crime.

Knowledge or lack thereof contributes to the way people view music and copyright in general.²¹⁹ Insufficient knowledge about the music industry and laws that govern it should be of great concern especially in developing countries. Many music users do not see anything wrong with copying or buying illegal music. This may be attributable to the affordability of illegal music in comparison to the original works; the situation gets worse when police, customs and judges have little or no knowledge of copyright. This manifests itself in court rulings and the way the customs and police handle copyright cases.²²⁰

Lack or limited knowledge results from the fact that the teaching and awareness of copyright is relatively new in many sub Saharan countries. Save for Nigeria and Ghana which have a longer tradition in the teaching of Intellectual Property at their

²¹⁸ For example, where the infringer can easily bribe their way out of an infringement case or arrest, it will be viewed as a small price to pay. In some instances, the infringer even gets to retain the infringing copies due to corruption within law enforcement agencies. See Paragraph 6.7 below.

²¹⁹ The general public, right holders and the law enforcement agencies have no clue of the rights conferred by the laws and the remedies available for infringement.

²²⁰ See paragraph 5.2, 5.3 and 6.1.

Universities, other countries do not have courses on Intellectual Property or have just recently embarked on the teaching and expanding the curriculum to cover more on copyright.²²¹ The domino effect can be felt, as there are few lawyers and ultimately magistrates and judges who take an interest in the subject. Ignorance or limited knowledge by rights holders exacerbates the situation. Since they do not know what their rights are and the remedies available in cases of infringement, it is difficult for law enforcement agencies to carry out their duties. Examples are drafting of charges and adducing evidence in court that thereby affects the number of cases that are handled by enforcement agencies.

In addition to the above, the value attached to music by society has a bearing on enforcement. Music for instance, hardly features on the economic surveys of developing countries and most do not have an idea as to how much it contributes to both the social as well as economic growth. In any case, music is not taken seriously both by governments and the society as is evident from resources allocated to the industry by the State. The music industry is treated as an informal industry and receives little if any government support. It helps cultivate the notion that it is not a valuable aspect of the economic and social well being of the society.

Parents and peers discourage musicians from venturing into the industry as a first career choice.²²² This attitude trickles down to public law enforcement agencies. On the other hand, in countries where the music industry is valued and recognised as one

²²¹ In Kenya, Intellectual Property was incorporated into the syllabus in 1995 and copyright only got more extensive coverage in 2004. The syllabus mainly focused on Industrial property.

²²² Most musicians in sub Saharan Africa have other jobs to supplement their income. They would rather have other full time jobs and music as a hobby. It is interesting to note that others in the industry such as the producers of sound recordings and owners or record studios also have other forms of income generating activities.

of the social and economic growth indicators, law enforcement together with the public are likely to give it the attention that it deserves.²²³ In OECD countries for instance, the Government is quite active in enforcement of rights and will be willing to introduce legislation and enforcement systems that will ensure the rights are protected against the unauthorised use by third parties.²²⁴

Consumers may embrace music from unauthorised sources as it allows them to have access to and purchase goods that would otherwise be beyond their means. They would thus be reluctant to help in curbing enforcement and would instead encourage illegal use by providing them with a ready market for the illegal goods.

Is copyright intended to provide incentives and rewards to the creators of the works or is it meant to facilitate the access and dissemination of the works? Based on the economic theory, copyright laws may be seen to protect the investments as opposed to creativity. International copyright law as witnessed in the recent past has been influenced greatly by rights holders, who are mainly investors such as the record companies. On the other hand, justice and fairness arguments emphasise on the person of the author as opposed to economic investors. How this impacts on the enforcement of copyright and related rights within the two systems will be discussed in greater detail in Chapter 5 and 6.

²²³ Countries like Singapore and Mexico recently carried out studies to measure the economic contribution of creative industries see "WIPO National Studies on Creative Industries 2006" WIPO Publication, Geneva.

²²⁴ Countries like the United States, Japan and the United Kingdom have put in place various enforcement mechanisms both legal and institutional to ensure the effective enforcement of copyright and related rights. In other countries like Kenya and Tanzania where the music industry has not been taken seriously, the enforcement levels are very low. In Guinea, Senegal and Ghana where the governments and the society in general recognised the importance of the music industry, several measures were put in place to try and curb piracy and to improve the music industry.

The perception by society of music, copyright law, the process of enforcement such as the availability and affordability of illegal music on the market, the limited or non-existent enforcement of copyright in music by the courts, and limited investigation of uses of unauthorised music, clearly have an impact on implementation of copyright law, especially through courts and in relation to curbing infringement through administrative procedures.

4.2.4. The Impact of Technology on Enforcement of Copyright.

Available and emerging technologies affect enforcement of copyright especially in the music industry. Technology has in the recent past developed faster than law. In the early days prior to the printing press, enforcement of copyright in literary works was not much of a problem because reproduction of texts involved painstaking efforts of copywriters and it was not worth the effort.²²⁵ Advances in technology brought about problems of enforcement.²²⁶ The author contends that significant technological changes in relation to the music industry were the advent of the gramophone, wireless radio, music cassettes and finally the digital technologies.

New technology facilitates unauthorised reproduction, use and communication to the public of copyright protected works at the national, regional and international level. Enforcement can no longer be restricted to national and regional level but has to be

²²⁵ See paragraph 3.3 above.

²²⁶ The advent of the printing press made it easier to copy books and this was to the disadvantage of Stationers. The Statute of Anne in the United Kingdom granted the Stationers rights to the exclusion of third parties.

harmonised at the international level.²²⁷ Fast and expeditious remedies required by the TRIPS Agreement provide a remedy in that rights holders can get temporary relief prior to court proceedings.²²⁸

New technologies have also put the existing legal regime to test as it is deemed to be incapable of dealing with unauthorised commercial use especially in the digital environment. The author contends that in the past, copyright has always been adopted to cater for the emerging technological changes, as basic principles remain the same. This was well captured by William R. Cornish:

“What is remarkable in the history of copyright is its resilience.... There seems to be no insuperable difficulty in using the constructs of copyright to protect material which is created and stored in digital form.”²²⁹

As to whether or not copyright is suitable in the digital era is subject to a separate discussion, which the author shall not address in this paper. The use of technological devices, contends the author, to enforce copyright is a welcome idea as it helps in enforcement over digital networks.²³⁰

Gillian Davies notes that:

²²⁷ See the Interim Report (2002) “Judicial Capacity Regarding Intellectual Property Enforcement and Dispute Settlement” International Intellectual Property Institute available online at <http://www.iipi.org/activities/Research>.

²²⁸ See paragraph 4.3.1.

²²⁹ W. R Cornish, (1999) *Intellectual Property* 4th Edition, London, Sweet and Maxwell p.531-532 as quoted by Gillian Davies. *Copyright and Public Interest op cit.* p.305.

²³⁰ Catherine Stromdale, (2006). The Problem with DRM. *Ent. L.R.* 2006, 17(1), pp 1-6. In this article, the author examines key features of the DRM process, their application in relation to illegal peer to peer (P2P) file sharing, the range of DRM standards applicable to online music, the regulatory challenges highlighted by a June 2005 report from the Organisation for Economic Cooperation and Development (OECD) and the strategy adopted by the Copyright and Related Rights Regulations 2003.

“Intellectual Property rights apply on the Internet but the difficulty is to make them enforceable. Digital technology has the potential to greatly facilitate enforcement. However, effective enforcement presupposes the right owners are given the legal framework necessary to enable them control these new markets. But it has been recognised that rights alone will not solve the enforcement difficulties associated with controlling rights in cyberspace. The second requirement for successfully controlling such rights is for the right owners to manage their product by means of secure technological protection measures to control their works combined with digital rights management systems (DRMs) to provide for remuneration when copying is permitted.”²³¹

However, there are two sides of the coin. Gillian Davies argues that technological protection measures raise questions in the context of copyright in relation to access to knowledge. She however notes that the measures are restricted to the digital form and will not affect the public interest.²³²

Consumers have welcomed file sharing applications over the Internet.²³³ The file sharing system has affected the attitude of those who would otherwise purchase the music using the legal channels.²³⁴ There are no studies in sub Saharan Africa that link the use of peer-to-peer file sharing systems to the decreased sales in the music industry. But they do pose a challenge to enforcement of the rights.

²³¹ Davies, D, *Copyright and Public Interest. op cit.* p.306.

²³² *Ibid.*

²³³ S. Saxby, (2003) United States: peer-2-peer networking software repels copyright infringement claims" 19/4 *C.L.S.R.* 337; A. Stokes and J. Rudkin-Binks, "On-line music--P2P aftershocks" 14/6 *Ent. L.R.* p. 127.

²³⁴ For further reading, see Patricia Akester, (2005). Copyright and the P2P Challenge. *E.I.P.R.* 27(3), 106-112; Shanon Yavorsky, (2006). Copyright- Music Piracy and File Sharing. *Ent. L.R.* 17(3), N23-25; Colin Nasir, (2005). From Scare Tactics to Surcharges and Other Ideas: Potential Solutions to Peer-To-Peer Copyright Infringement: Part 3, *Ent. L.R.* 2005, 16(5), pp.105-110.

There are several cases that address challenges brought about by digital technology that enables file sharing.²³⁵ However as discussed above, Article 7 of the TRIPS Agreement provides that: the protection and enforcement of Intellectual Property should contribute to the promotion of technological innovation as well as to the transfer and dissemination of technology to the mutual advantage of the producers together with the users of technological knowledge and in a manner conducive to the social and economic welfare, and to balance the rights and obligations.

Technology can be a double-edged sword as it may be used to stop unauthorised commercial use and at the same time it may be used to facilitate unauthorised commercial use.²³⁶ Unauthorised commercial use over digital networks of copyright works within the continent is now a reality and is affecting various copyright industries especially the music industry.²³⁷ Music producers and musicians in Kenya, Nigeria, Senegal and South Africa have all raised concerns over the illegal use of their works over the Internet. Mr. Aziz Dieng of AMS Senegal pointed out that the Senegalese in Diaspora were the main consumers of illegal download.²³⁸ In Kenya, the Kenya Copyright Board has carried out several raids in the cyber cafés within Nairobi and confiscated hardware with illegal downloads.²³⁹ A good example of how

²³⁵ There are several cases that address the challenges brought about by the digital technologies such as the *A&M Records Inc v Napster Inc* 239 F.3d 1004 (2001) (9th Cir (US)), *Metro-Goldwyn-Mayer Studios Inc v. Grokster Ltd* 380 F.3d 1154 (2004) (9th Cir (US)), *Aimster Copyright Litigation*, Re 334 F.3d 643 (2003) (7th Cir (US)).

²³⁶ Gillian Davies. *Copyright and Public Interest op cit* p. 305, Thomas Drier, (1997). "Copyright Law and Digital Exploitation of Works, The Current Copyright Landscape in the Age of the internet and Multi Media" available online at www.ipauie.org/copyright/copyright_pub/drier.html. See also P. Akester and F. Lima, (2005). Intellectual property; Information technology: The economic dimension of the digital challenge: a copyright perspective. *I.E.* 2005, 1, 69-81.

²³⁷ The exact figures are not available as no comprehensive study has been done on the effect of unauthorised commercial use over the internet on the copyright industries in sub Saharan Africa.

²³⁸ Interview with Mr. Aziz Dieng 2005 of AMS and Madam Sibi (BSDA) in May 2007. They both were concerned that the illegal downloads sometimes precede the release of music by the original producers.

²³⁹ Interview with Mr. Edward Sigei, Head of the Enforcement Unit, Kenya Copyright Board.

technology can impact on enforcement is the advent of music cassettes in the 1980s and subsequently the CDs and finally the Peer-to-Peer file sharing system.

Technology available for enforcement of copyright may also be considered under this point.

The type of technology and systems available to law enforcement officers is crucial in apprehending the alleged infringers.²⁴⁰ Communication tools are essential for purposes of gathering and disseminating intelligence on acts of unauthorised commercial use that have occurred or about to happen.²⁴¹

The availability and reliability of these systems is essential. Most modern airports in sub Saharan Africa are equipped with the reliable systems over which the information can be relayed. However, the same cannot be said for the smaller border points although the various customs offices are in the process of upgrading the systems. Efficient communication tools are also essential to other law enforcement agencies and the public as well. The availability of other equipment to help in the identification of illegal music is also important.²⁴²

²⁴⁰ C.Nasir. *supra*, footnote 83.

²⁴¹ The Internet for instance can be used to relay information about a shipment of pirated music that is headed to a particular border point. Mr. Richard Rademan, the former IFPI enforcement coordinator gave instances where IFPI received information that there was an illegal shipment of music and films headed for South Africa from Pakistan via the Jomo Kenyatta International Airport in Nairobi. This information was relayed to the Customs officials in Kenya and the goods were intercepted in Nairobi. The customs officials at the border point can act on the information to intercept the infringing goods. This information could be relayed via the Internet, fax, telephone, fax, and mobile phone among others. Based on Interview with Mr. Richard Rademen, the IFPI Enforcement Officer for Africa in 2004.

²⁴² In Kenya for instance, the customs officials would rely on random searches on the various goods that came into the market. Since they did not check the entire consignment, the pirates would either declare the pirated goods as other goods such as books; blank recording media etc and get away with it. The acquisition of scanners has made it possible for them to identify various goods within the containers and make their searches easier.

4.2.5. Prevailing Political and Economic Conditions

Prior to 1970, enforcement of copyright in developing countries was not much of an issue. This was largely due to the “dependency theory” that was used to support the developing countries argument that copying was part and parcel of the development process.²⁴³

It was based on the argument used by the United States in 1886 when they refused to sign the Berne Convention on the grounds that they, as a developing country needed access to knowledge.²⁴⁴ They further argued that protecting and enforcing Intellectual Property in a developing country amounts to protecting foreign works from developed countries. This, they argued, was not desirable as it only widened the economic gap between the developing and developed countries.

In a way, this will explain the lack or minimum enforcement of copyright laws in developing countries including sub Saharan Africa.

In the 1970s, the situation changed and there was pressure from the international community, namely the United States for stronger intellectual property laws and enforcement in Asia.²⁴⁵ This pressure was in turn directed to sub Saharan Africa in the late 1980s and early 1990s. There are many reasons that have been advanced for this change and Uphoff argues that there are three main reasons. First, the increased literacy level increased the demands for western products such as books, films and

²⁴³ See Darko Djaic, (2000). Why does enforcement of Indonesia's Intellectual Property laws continue to be a problem? *E.I.P.R* 22 (10) pp. 454-469.

²⁴⁴ For a more detailed account see E.Uphoff, (1991) Intellectual Property and the US Relations with Indonesia, Malaysia, Singapore and Thailand. p. 127 (as cited by Darko Djaic, in 'Why Does Enforcement of Indonesia's Intellectual Property Laws Continue to be a Problem?' *E.I.P.R* (10) p.454).

²⁴⁵ *Ibid*

music creating higher demand than supply. Those engaged in unauthorised reproduction and distribution simply filled the gap created by the prevailing market conditions. Secondly, advances in technology made copying easier and after a while, developing countries especially in Asia were exporting the pirated books, music and films to other countries. Thirdly, the third world countries, which were previously not on the intellectual property map, were recognised as potential markets.²⁴⁶ These illegal copies found their way to markets in other developing countries, as they were cheaper and more accessible than the original products. It is interesting to note that multinationals had previously ignored developing countries as they considered the markets insignificant.

To understand the political and economic dynamics, we shall take the example of the United States. In 2002, the copyright industries contributed US\$ 626.2 billion to the value of the US Economy, which translates to about 5.98% of the GDP.²⁴⁷ The increased use of United States copyright products in developing countries prompted the industry to lobby the government for better protection of their products in third world countries. In 1984, Congress in the United States enacted the Tariff and Trade Act. The Act allowed the United States to tie import privileges to the US to the improved Intellectual Property systems in developing countries. These were generally used against developing countries in Asia as they posed an immediate threat to copyright industries in the United States. In 1988, US Congress introduced “Super 301” which allowed the United States to draw up a list of countries that would be put

²⁴⁶ *Ibid.*

²⁴⁷ See Copyright Industries in the United States Economy Report 2004 by Stephen E. Siwek prepared for the International Intellectual Property Alliance available at: http://www.iipa.com/pdf/2004_SIWEK_FULL.pdf IIPA estimates that copyright piracy around the world inflicts approximately \$20-\$22 billion in annual losses to the U.S. copyright industries (and this estimate does not include unauthorised commercial use over the internet).

on the Watch List and threatened with economic sanctions if they failed to comply.²⁴⁸ Kenya, Nigeria and South Africa have all been named in the IIPA as countries deserving special mention.²⁴⁹ This is meant to apply pressure on the governments to come up with more efficient intellectual property enforcement mechanisms.

The political and economic pressure for strong enforcement was consolidated in the 1994 Trade Related Aspects of Intellectual Property Rights (TRIPS) Agreement, which made it mandatory for all member states to provide for fast and efficient enforcement of Intellectual Property.²⁵⁰ Since the possibility of missing out on trading privileges and the risk of sanctions under the WTO, most developing countries have reformed their laws and are trying to put enforcement mechanisms in place. It seems that the TRIPS Agreement is not enough and countries like United States of America are coming up with "TRIPS Plus" provisions that are imposed on the developing countries through the bilateral trade agreements as well as Free Trade Agreements (FTAs). This is because TRIPS only provides for the minimum standards.²⁵¹

According to the World Bank, the effective enforcement of Intellectual Property rights in general tends to rise with income levels.²⁵² The institutional capacity will thus be affected by the amount of resources available for enforcement. This argument has been supported by various studies carried out in the developing countries.²⁵³

²⁴⁸ Djia D. *supra*, footnote 92.

²⁴⁹ Indonesia has been named several times on the list and this has forced the government to amend the laws accordingly including see IIPA Special 301 Embargo Press Release 2006. <http://www.iipa.com/pressreleases/IIPA%202006%20Special%20301%20EMBARGOED%20Press%20Release.pdf>.

²⁵⁰ See Part Three of the TRIPS Agreement as well as paragraph 4.3.3.

²⁵¹ The United States is currently using Free Trade Agreements to include the "TRIPS Plus" provisions. An example is the Agreement with the Southern Africa Customs Union (SACU).

²⁵² See World Bank Report 2002.

²⁵³ The Commission on Intellectual Property Rights commissioned several studies in developing and least developed countries. For further information on the same, see Maart Leesti and Tom Pengelly,

OECD countries have high levels of income and thus more resources available for enforcement as opposed with developing countries or least developed countries that have budgetary constraints occasioned by their relatively lower income.

Apart from international political and economic pressure, enforcement is also determined by the local political will as well as prevailing economic circumstances.²⁵⁴

The ability to provide resources required to combat unauthorised commercial use makes a difference with regard to enforcement of the rights. This depends on several factors such as costs of enforcement, political will as well as availability of resources. Not much in terms of human resources and infrastructure has been allocated for enforcement of copyright and the copyright industries as a whole. This is traceable to lack of policy on copyright in several developing nations.²⁵⁵

Strengthened legal regimes are ineffective as limited resources are allocated for actual enforcement.²⁵⁶ The purchasing power of end users or would be end users and the cost of the original product on the market has to be taken into account. Where the cost of the product is beyond the income of users, there is likelihood that a black market for the pirated goods will appear, increasing the levels of infringement and consequently

(2002). 'Institutional issues for developing countries in intellectual property policy making, administration and Enforcement.' *Commission on Intellectual Property Rights, Study Paper 9*.

²⁵⁴ See paragraph 5.1.

²⁵⁵ Several countries in Africa do not have clear Intellectual property policies especially in the field of copyright and related rights. Kenya is in the process of enacting an IP policy. It is interesting to note that regional conference was held in Nairobi to map out the IP policy in Africa and surprisingly it was dominated by participants and speakers from the industrial property offices. The author had the opportunity of interacting with the participants and the speakers from the region and most admitted that their countries did not have a Government policy on IP and enforcement of IP. Countries represented included Ghana, Nigeria, Uganda, Seychelles, Mauritius, The Democratic Republic of Congo, Burundi, Kenya, Malawi and Zambia. WIPO/Ministry of Trade (Kenya) Regional meeting on the IP Policy in Africa, held 28th February – 1st March 2006, Nairobi Kenya. See paper presented by Marisella Ouma "Re-Organising the Key players in the Music Industry" at the same workshop. (On file with the author and WIPO.)

²⁵⁶ A similar opinion was expressed by C. Massa and A. Stowe. (2004). The scope of the proposed IP Enforcement Directive: Torn between the desire to harmonise remedies and combat piracy.' *E.I.P.R.*, 26(6), 244-253.

increasing the cost of enforcement. Consumers in Kenya, Nigeria, South Africa and Senegal raised the issue. They argued that the cost of genuine music was beyond their means while unauthorised copies were affordable. The correlation will also be determined by consumer preferences and it ties in with the point discussed above on the cost of sanctions in relation to the benefit from the unauthorised commercial use.

The level of economic development has a bearing on enforcement of copyright especially by law enforcement agencies. In certain countries, unauthorised commercial use has become an industry and provides employment for thousands such as the distributors, the hawkers, and those involved in the duplication of the music. Strict enforcement of copyright would be seen to be against the economic empowerment of the locals.²⁵⁷ While it may be true that the unauthorised commercial use provides employment especially where the unemployment rate is high, one has to consider the effect of this “industry” on rights holders, especially local ones.

Secondly, those engaged in the unauthorised commercial use do not pay taxes and no royalties get back to rights holders. Thus where the government views this as a source of employment for its citizens, it is unlikely to put in place enforcement measures that would effectively cut down this income generating industry. This contrasts sharply with countries that have the established music industries and strong economies; unauthorised commercial use is treated as an outright violation of copyright law. The

²⁵⁷ This is an argument that was used by the Kenya Association of Audio Visual traders in Kenya when they were lobbying for amendments in the then Copyright Bill in 2001. The Chairman was of the opinion that many of his members relied on the music and movies that they sold and distributed even where they did not have authorisation from the right holders who were mainly foreign. In Nigeria, at one point the pirates sought to have their businesses legitimised but this did not quite work out, as there was strong opposition from the right holders and the copyright office as well.

income generated by the illegal industry is counted as a loss for the legitimate music industry. They in turn try and ensure that they have efficient enforcement measures.²⁵⁸

The growth of local music industries has also contributed to increased enforcement of rights. Copyright is no longer seen as the preserve for foreign works. Rights holders within the local music industry have realised the need for effective enforcement of copyright and have been quite instrumental in enactment of new copyright laws.²⁵⁹

Countries in sub Saharan Africa have realised the need for good effective enforcement of copyright due to the growing local music industry and increased regional as well as international trade in music. The economic pressure for proper enforcement mechanisms is from both within and beyond national borders.

4.3 Laws and Institutions as the Basic Enforcement Regime on Copyright in the Music Industry

The author previously illustrated in paragraph 3.3 how copyright law grants rights holders the exclusive rights to control their works. The question is how the law ensures that unauthorised third parties do not exploit these rights. The law sets out what constitutes infringement and makes it illegal and even creates offences that are punishable.²⁶⁰ Rules in respect of actions for various infringing actions are jurisdictional. Remedies and penalties will thus vary from country to country. To

²⁵⁸ Examples are the United States, Australia, and Japan.

²⁵⁹ In Nigeria, after 1970 amendments in the copyright Act were driven by the local copyright industry. See Chapter 3 on the development of copyright in Nigeria. In Kenya, the New Act had a considerable contribution from the copyright industry.

²⁶⁰ See Paragraph 3.3.5.

ensure enforcement of these rights, the law has to prescribe the modalities for enforcement as well as the institutions that deal with enforcement.²⁶¹

The TRIPS Agreement provides minimum standards that each member should adopt and nothing in the agreement stops the member states from adopting TRIPS plus standards. There are no international rules that set out exact penalties.

4.3.1. Conceptualising the Legal Regime

The analysis of factors that influence enforcement of copyright and related rights leads us to the laws and institutional enforcement structures. Rights holders may rely on three institutional set ups for the enforcement of their rights: First there are public institutions that are either set up by statute or are part of the existing Government structure. These include copyright offices, courts and other enforcement agencies. Secondly, there are private institutions that are either set up by industry organisations or individual rights holders. From an economic perspective, collective private organisations are set up by rights holders to reduce the cost of enforcement by sharing the attendant costs and intelligence. Examples are industry-based organisations created to deal with matters such as piracy such as the Kenya Music Anti Piracy Association (KEMAA) in Kenya and the South Africa Federation against Theft (SAFACT) in South Africa. Thirdly, are public/private partnerships that are created to share costs and as well as resources.²⁶² This will be discussed in further in Chapter

²⁶¹ See Paragraph 4.2.

²⁶² Similar opinion held by Brousseau and Bessy, Public and Private Institutions in the Governance of Intellectual Property Rights, *op cit.* p. 3.

5.²⁶³ The laws prescribe remedies and penalties for unauthorised commercial use and provides for institutions to enforce them.

4.3.1.1. International Laws

The international copyright system was for a very long time concerned with harmonisation of substantive rules and standards. Enforcement of copyright was treated as a domestic issue and was left to individual countries to set out laws as well as determine enforcement matters at national level. The existing international instruments such as the Berne Convention made specific provisions especially with regard to seizure and not much on the enforcement of copyright at the international level. This situation prevailed until the TRIPS Agreement, which had very clear provisions on enforcement of Intellectual Property rights. The aim of this section is to look at existing international and regional norms on enforcement. The author will examine specific provisions contained in various international and regional instruments as well as the current regional structures within Africa and their policies on enforcement.

The Berne Convention did not make specific provisions with regard to enforcement of copyright. There are however three general provisions on the enforcement of copyright in music. The first one provides for seizure of copies of certain recordings of musical works imported without the authority of the rights holders' or assignees.²⁶⁴

²⁶³ See paragraph 5.7.

²⁶⁴ Article 13(3) The rights holder, under the law has the exclusive rights to authorise the recording of his works and the importation of the works into his country. If a third party, without his authorisation, brings in the sound recordings of his work, the author has the right to have the copyright works seized. This provision, it may be assumed was made to cater for the cross border issues among the member states and to ensure that the works that were imported were legitimate. It did not allow the parallel importation of the sound recordings as the right holder had full control of the imports. This facilitated enforcement as the sound recordings that came in without the right holder's authority could be seized and avoid any release into the channels of commerce.

The second provision creates a presumption of copyright ownership and the author of the music has the right to institute proceedings within member countries of the Berne Union in case of copyright infringement.²⁶⁵ The third provision grants the right to seize infringing works within the Berne Member States even if they are no longer protected within their country of origin.²⁶⁶ This was quite a peculiar provision given that copyright subsists for a certain time and if it expired it would apply to all the member states. The author of this research has yet to find the rationale for this provision. The convention leaves the formulation of legislation and modalities to member states with regard to seizure of infringing copies. As such, member states may adopt necessary measures to ensure application of the convention and by extension of their national law.

This omission created an interesting situation among member states. First, enforcement was left to individual member states and invariably they each had different enforcement laws and procedures.

Enforcement was thus purely in the domain of the national regimes. Second, there was lack of harmonisation of enforcement laws and procedures, which would have an effect on the music industry. This is due to cross border piracy.²⁶⁷ Third, the Convention did not create any obligation for member states to provide for enforcement.²⁶⁸

²⁶⁵ Article 15(1) Berne Convention. The provision gives the rights holders the right to sue and institute proceedings for infringement in the country where the infringement occurred, as long as it was within the Berne Union.

²⁶⁶ Article 16 Berne Convention.

²⁶⁷ See paragraph 5.4.

²⁶⁸ There were countries, which simply did not make specific enforcement provisions in their laws. The laws were limited to the infringement provisions and the remedies therein. See Kenya Copyright Act of 1966 Chapter 130 of the laws of Kenya (now repealed), Copyright Act of Uganda 1964, and Nigerian Copyright Act of 1989 as amended.

The Universal Copyright Convention (UCC) is very general. Article 1 of the UCC contains a general obligation for contracting States to grant adequate and effective protection for copyright. Just as with the Berne Convention, there are no specific provisions on enforcement.

Protection granted by the Berne Convention was limited to authors of copyright works and did not extend to performers, producers and broadcasting organisations. The Rome Convention was an attempt to set out the minimum international standards for protection of related rights.²⁶⁹ Curiously, the Convention did not make any specific provisions for enforcement of the rights contained therein. The Convention, like the Berne Convention requires the member states to ensure that they have legal provisions to implement the convention effectively. Similar provisions can be found in the Phonograms Convention.²⁷⁰ There are other conventions that deal with related rights.²⁷¹

Large scale unauthorised reproduction and sale of pre-recorded music in cassette form was becoming a major problem in the music industry by the end of the 1960s. This was due to the shift from vinyl discs to music cassettes (MCs). The reproduction of MCs involved cheaper and more compact technology.²⁷² It had a negative impact on the music industry. The record industry, through the IFPI pushed for a new international treaty, which focused on the control and punishment of unauthorised

²⁶⁹ The International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (Rome 1961).

²⁷⁰ Article 2 Phonograms Convention.

²⁷¹ See document by the International Bureau of WIPO, Basic Notions of Neighbouring Rights – International Conventions in the Field of Neighbouring Rights WIPO/CR/GE/93/3.

²⁷² See paragraph 2.5.

commercial use.²⁷³ This led to the 1971 Convention for the Protection of Producers of Phonograms against the Unauthorised Duplication of their Phonograms (The Phonograms Convention).²⁷⁴ It is the only convention prior to TRIPS that had specific provisions to help counter the problem of unauthorised commercial duplication in sound recordings.

The above conventions, it has been noted, made general but limited references obliging members to enforce the protected rights.²⁷⁵ This could be due to different copyright systems that existed at the time of drafting the conventions. The author's right system treated copyright as an extension of one's persona while the copyright system viewed them as economic rights.

With no international standards, the enforcement of copyright varied from country to country as was discussed in paragraph 3.3. At the beginning of the 20th century, this was not much of an issue as individual countries could enter into bilateral or multilateral agreements with regard to protection and enforcement of their respective rights. There were two main factors which brought enforcement of intellectual property to the international level. One was the growth of international trade especially in intellectual property. The other was the advance in technology, which enabled easier dissemination of copyright protected works over digital networks.

²⁷³ David Laing. *Copyright, Politics and the International Music Industry*, *op cit* p. 77.

²⁷⁴ Kenya became a member of the Convention in 1976 and subsequently provided for the protection of the producers of sound recordings under the Copyright Act. South Africa granted the producer of the sound recording the exclusive rights of reproduction, distribution, sale and communication to the public. Section 9 [Amended by Act No. 56 of 1980 and Act No. 52 of 1984 and Act No. 61 of 1989] of the Copyright Act of South Africa Nigeria grants the producers of sound recordings copyright in their sound recordings. Section 6 Nigerian Copyright Act (as amended). It is important to note, however, that Nigeria and South Africa are not signatories to the Convention.

²⁷⁵ Abbot, F Cottier, T. and Gurry, F. (eds.) (1999) *The International Intellectual Property System Commentary and Materials*. London: Kluwer International p.1569, J.A.L Sterling, *op cit* p. 574.

There was need to set minimum standards and this was addressed in the TRIPS Agreement in 1994.²⁷⁶ Enforcement of Intellectual Property rights is as one of the factors behind the TRIPS negotiations.²⁷⁷ The preamble to the TRIPS Agreement states;

“To reduce distortions and impediments to international trade, and taking into account the need to promote effective and adequate protection of intellectual property rights and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade. It recognised the need for new rules and disciplines concerning, among others.....the provision of effective and appropriate means for the enforcement of trade related intellectual property rights, taking into account differences in national legal systems.....”

The TRIPS Agreement brought Intellectual Property under the World Trade Organisation. It requires the WTO member States to adhere to the minimum standards of protection set out by the existing laws and to provide for effective and expeditious remedies for infringement of intellectual property rights. Article 41(1), however, member states are not obliged to provide separate judicial systems for enforcement of intellectual property rights. Article 41 also provides that enforcement procedures should be fair and equitable.²⁷⁸ It also establishes guidelines for civil and administrative remedies, criminal procedures as well as provisional and border measures.²⁷⁹ TRIPS Agreement sets out more specific and detailed requirements for

²⁷⁶ Daniel Gervais. (2003). *The TRIPS Agreement: Drafting History and Analysis*. London: Sweet and Maxwell. p. 289, J.A.L. Sterling *World Copyright Law. op cit.* p. 432.

²⁷⁷ Frederick Abbot, *The International Intellectual Property System Commentary and Materials .op. cit* .p. 1569.

²⁷⁸ This will be discussed in greater detail in Chapter 6.

²⁷⁹ Articles 42 to 61 TRIPS Agreement. See Chapter 6.

enforcement of intellectual property rights as a whole.²⁸⁰ Failure to implement standards of enforcement set out by the TRIPS Agreement would subject a member state to a complaint under its settlement procedure.

TRIPS is non prescriptive about conditions for granting of private rights but more specific about procedures for enforcing the rights and the permissible limitations to private rights to safeguard public interest.²⁸¹ Effective protection and enforcement is seen to be necessary for the growth as well as the development of Intellectual Property.²⁸²

Proponents of the TRIPS Agreement, based on the economic theory argue that the failure to enforce strong intellectual property laws will harm existing rights holders. It is questionable whether or not non-enforcement of copyright in developing countries especially those in sub Saharan Africa would be a threat to these industries. This is evident in the fact that the same industries that are pushing for stronger enforcement are not represented in most parts of the continent. Record companies have been reluctant to invest in most of sub Saharan Africa on grounds that copyright law is not enforcement in the region. In the music industry, consumer preferences are changing.

²⁸⁰ Part III of the Agreement deals with the enforcement of copyright and related rights within the member countries. These provisions are either mandatory or optional. Members are free to provide measures stronger than the TRIPS Agreement.

²⁸¹ Thomas Dreier. "TRIPS and the Enforcement of IPRS" in F. Beier and G.Schricker, (1996) *From GATT to TRIPS* IIC Studies Max Planck Institute 7/VCH Weinheim p. 255.

²⁸² Article 7 of the TRIPS Agreement The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of the producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to balance the rights and obligations. Article 8 One, Members may in formulating or amending their laws and regulations, adopt measures to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their social economic and technological development, provided that such measures are consistent with the provisions of the Agreement. Two, appropriate measures, provided they are consistent with the provisions of this Agreement, may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain the trade or adversely affect the international transfer of technology.

However, with the growing music industry in the continent, strong enforcement measures will be beneficial to local artists as well whose works have not been spared from unauthorised use.

One significant provision is the availability of expedient procedures to the copyright holder pending trial. These enable the rights holder to secure and preserve evidence for court cases.²⁸³ The laws also provides for expedient judicial procedures to stem off further violations while awaiting determination of cases.²⁸⁴ Rules on enforcement contained in the TRIPS Agreement are subject to the general principles of fairness and equity.²⁸⁵ This would be applicable in enforcement of various provisions within the laws to protect innocent defendants against malicious prosecutions. It and also ensures that the right holders are appropriately compensated where unauthorised commercial reproduction, sale and distribution has occurred.

The provisions on enforcement of IPRs under TRIPS had significant shortcomings. First, the standards set out were seen to be too broad and this, some scholars have argued would result in divergent interpretations. This is because the interpretation of the broad standards is left to national courts.²⁸⁶ In effect, it would result in divergent provisions within the various member states. Secondly, the provisions were largely based on the United States standards and many countries especially developing countries are not familiar or do not have systems similar to the United States. This applies in the case of the various types of injunctions, and pre trial procedures. The

²⁸³ In common law jurisdictions, the Anton Piller Orders are available while in the civil law systems the *siase-contrefaçon* procedure is available. These will be discussed in greater detail in Chapter 5.

²⁸⁴ The Copyright Laws in Kenya, Senegal and South Africa provide for remedies such as injunctions and this will be discussed in greater detail in Chapter 5.

²⁸⁵ J. Drawler, (1999). IP Law, Commercial Creative and Industrial Property. *Law Journal Press*. NY 1A-100.

²⁸⁶ Daniel Gervais. *The TRIPS Agreement: Drafting History and Analysis*, op cit. p.289.

third point relates to the impact of enforcement provisions in developing countries.²⁸⁷ Since TRIPS was negotiated and based on the pre-existing enforcement regimes in the United States, not much input was made by the developing countries and in signing the treaties, they simply accepted the terms set out with certain exceptions.

Some concerns raised by the developing countries were accommodated including Article 41(5) and Article 46. Having the new enforcement provisions as required by the TRIPS Agreement will not automatically eradicate the unauthorised commercial use of music. The relevant institutions have to be put into place. The author argues that even with strong enforcement mechanisms, unauthorised commercial use of music can still be a problem.

Article 41(5) places no obligation to the Member States to set up separate courts for the determination of IP cases. Article 46 which makes reference to existing constitutional requirements and had been requested by Brazil. It is one of the few provisions of the treaty that took into account the concerns of developing countries. In relation to copyright, more pressing matters were ignored. These included issues of access to copyright works especially educational material by developing countries. Developing countries should have been given more exemptions and limitations so as to give them the time and framework within which to develop their industries.

The author reiterates that although the appropriateness of compliance with TRIPS by developing countries especially those in sub Saharan Africa has been questioned by the governments and various scholars, developing countries have to comply by the

²⁸⁷ *Ibid.*

deadlines set or risk the imposition of trade sanctions. It is notable that at the moment, the compliance is mandatory. Developing countries may however propose amendments to the TRIPS Agreement to ensure that their interests are catered for.²⁸⁸ Enforcement of copyright in the music industry is important in the region as these countries are also producers and rights holders. In paragraph 2.2 and 2.5, the author discussed the development and challenges faced by the music industry especially in relation to enforcement. Contrary to popular belief that Africa only consumes music from outside, there is an industry to be nurtured by providing and necessary legal and administrative network.

However, it is important to note that implications of the TRIPS agreement can only be analysed on a case by case basis as was captured by Dr. Carlos Correa;

It is extremely difficult to generalize the likely implications of the Trade-Related Intellectual Property Rights (TRIPs) Agreement in developing countries or of a group thereof. Such implications will substantially vary depending on the divergence existing between the Intellectual Property Rights (IPRs) laws of a particular country and the standards of the Agreement, the degree of development in different sectors, the per capita income, and the structure of the supply (particularly the presence or not of local suppliers in a given field), among other factors.²⁸⁹

Whereas the provisions of TRIPS may hamper the access to learning material for developing countries, assuming that they are net consumers of learning material, the

²⁸⁸ During the Kenyan TRIPS review in 2001, these are some of the questions which were raised by the Kenyan delegation at the WTO. The panel emphasized that Kenya, like other WTO member states had no choice but to ensure that their laws were fully compliant with the Provisions of the TRIPS Agreement. (Document on file at the State Law Office, Nairobi, Kenya)

²⁸⁹ Carlos Correa "Implementing TRIPS in Developing Countries" Third World Network, available online at: <http://www.twinside.org.sg/title/ment-cn.htm>.

enforcement of copyright is likely to boost the music industry as they are producers.

290

The standards of protection and enforcement required of WTO member states are very high. It is notable that the developed countries only recently achieved the said standards while some are still in the process of doing so. For instance, the European Union until recently did not have a regional stand on criminalization of copyright²⁹¹.

The effectiveness of the TRIPS in relation to enforcement in sub Saharan Africa is yet to be evaluated as several countries have just recently amended their laws or are in the process of doing so. They are also setting up the institutions that will execute the provisions of the law.

The TRIPS Agreement was negotiated in 1994 while there were other technological advances taking place especially in the digital environment. There were several issues raised by the digital technologies that were not covered by the TRIPS Agreement creating a need for the two WIPO 'Internet' Treaties that were concluded in 1996 at the WIPO Diplomatic Conference.²⁹² These were the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). The two treaties made provisions for technological advances to protect works in the digital environment.

²⁹⁰ A good example is South Africa. See Cultural Industries Growth Strategy (CIGS) South African Music Industry, report done for the then Department of Arts, Culture, Science and Technology (DACST) 1998 Available at: http://www.dac.gov.za/reports/music_pub_film_craft/musfin1.doc.

²⁹¹ Kirstin Hunair. (2006). The Enforcement Directive-its effects on UK Law *E.I.P.R* 28 (2), 92-99.

²⁹² Uma Suthersanen. (2005) The Future of Copyright Reform in Developing Countries: Technological Interpretation, Localised Globalism And The "Public Interest" Rule.' Available at http://www.iprsonline.org/unctadictsd/bellagio/Bellagio2005/Suthersanen_final.pdf (last accessed December 2006).

Current and emerging digital technologies have made it possible to reproduce and distribute copyright works including music via the Internet.²⁹³

The two treaties provide for technological protection measures and electronic rights management information systems. These include provisions against circumvention of technological devices protecting legitimate copyright works and provision of such technologies.²⁹⁴ Currently, there are 65 countries that have ratified the WCT and 64 have ratified the WPPT.²⁹⁵ Kenya, Nigeria and South Africa have not ratified the two treaties although they were involved in the diplomatic conferences that drafted the treaties. They however have provisions for protection of the rights management information systems and electronic rights management systems as will be discussed in paragraph 5.3.

4.3.1.2. Regional Instruments

Just as in the international realm, regional instruments left matters of enforcement to individual countries especially with regard to penalties and procedures.

Prior to 2004, in the European Union (EU), the general rules of enforcement contained in the Brussels Convention on Jurisdiction and Enforcement of Judgement in Civil and Commercial Matters (1968) together with other International instruments would be applied to copyright cases.²⁹⁶ The EU Directive on harmonisation of certain

²⁹³ Mp3, Napster and other peer-to-peer file sharing have made it possible to copy and distribute music works via the Internet.

²⁹⁴ Article 11 and 12 WCT and Articles 18 and 19 of the WPPT For further reading see Sterling J.A.L *op cit* at 14.03.

²⁹⁵ Status as per August 2008 source http://www.wipo.int/treaties/en/ShowResults.jsp?treaty_id=16x and http://www.wipo.int/treaties/en/ShowResults.jsp?treaty_id=20.

²⁹⁶ Currently, there is a proposal a European Parliament and Council Directive on Criminal Measures ensuring the enforcement of Intellectual Property Rights (COM) 2005, Final Proposal for Council Framework Decision to Strengthen the Criminal law framework to Combat Intellectual Property Offences COM (2005) 276. See Pat Treacy and Anna Wry, (2006) IP Crimes; The Prospect for EU-Wide Criminal Sanctions- Long Road Ahead? *E.I.P.R* 28 (1) pp.1-4 and Paul Joseph, (2005) What EU harmonisation really means for Intellectual Property owners. *M.I.P* 152 pp. 66-88.

aspects of copyright and related rights in the information society adopted in 2001 in the spirit of the existing legislation left the details of enforcement to individual member states.²⁹⁷ The EU did not feel the need to have harmonised sanctions on copyright and related rights until recently.²⁹⁸

In 2004, the EU adopted the Directive on the Enforcement of Intellectual Property Rights.²⁹⁹ It had detailed provisions for civil remedies but was silent on criminal sanctions.³⁰⁰ Article 16 simply provides that members may apply other appropriate measures in cases where Intellectual Property rights have been infringed. This was a departure from the final proposal on the same directive, which had made specific provisions with regard to criminal sanctions.³⁰¹ Members are left to draft their own laws on criminal sanctions which do not in any way affect civil remedies.

The situation in the European Union goes on to show that enforcement procedures especially with regard to criminal sanctions are still viewed as the domain of domestic

²⁹⁷ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society OJ 2001 L167/10 A similar provision exists in Article 18(1) of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') It states 'Member States shall ensure that court actions available under national law concerning information society services' activities allow for the rapid adoption of measures, including interim measures, designed to terminate any alleged infringement and to prevent any further impairment of the interests involved.'

²⁹⁸ Kirstin Hunair. (2006). The Enforcement Directive-its effects on UK Law *E.I.P.R* 28 (2), 92-99.

²⁹⁹ See Directive 2004/48/EC of the European Parliament and of the Council of 29th April 2004 on the Enforcement of Intellectual Property Rights Official Journal L157, 30/04/2004 P0045-0086 and the Corrigendum to the Directive 2004/48/EC of the European Parliament and Council of 29th April on the Enforcement of Intellectual Property Rights OJL 157 30/04/2004.

³⁰⁰ There is currently a proposal for harmonisation of criminal sanctions in the EU. In April 2006, the European Commission proposed a new law that seeks to introduce minimum fines and jail terms for counterfeiting and piracy in the European Union. The minimum fine proposed is 300 000 Euros and four years jail term.

³⁰¹ Article 20 of the Proposal for a Directive of the European Parliament and of the Council on the measures and procedures to ensure the enforcement of intellectual property rights Brussels 20.2003 COM (2003) 46 Final, 2003/0024 (COD) For further analysis of the Directive, see Hunair, Kirstin *supra* note 146 and Charles H. Massa, and Alain Strowel. (2004). The Scope of the proposed IP Enforcement Directive: Torn between the desire to harmonise remedies and the need to combat piracy *E.I.P.R.*, 26 (6), pp. 244-253.

legislation. This situation might change if the European Commission (EC) adopts the proposal for a directive to combat all types of infringement through criminal sanctions.³⁰² The directive generally requires member states to provide measures and remedies that are efficient and expeditious as well as fair and equitable.³⁰³ It mirrors Article 41 of the TRIPS Agreement.

There are many lessons to be learnt from the EU experience. One is the harmonisation of enforcement procedures. Harmonisation of civil procedures was achieved by the Directive 2004/48/EC. In Africa, there are various economic blocs and Customs Unions that allow free movement of goods within a particular economic bloc. With the porous borders among member states, it is essential that laws be harmonised. In the EU, they look for member countries with the most lax enforcement regime through which they get their goods into the common market.

In East Africa, the East African Community (EAC) has recently established a Customs Union effectively allowing free movement of goods within the region. Unauthorised music that originates from Uganda eventually finds its way into Kenya, Tanzania and other parts of Africa.³⁰⁴ Kenya, Uganda,³⁰⁵ Rwanda, Burundi³⁰⁶ and Tanzania have recently amended their laws and are upgrading their enforcement structures. It would thus be in their interests to harmonise their laws.

³⁰² The criminal provisions were included in the final draft of the Directive but were left out by the Directive itself. There are currently efforts to come up with harmonised criminal remedies for intellectual property infringement in the European Union. See Hunair Kristin, *supra*, footnote 146.

³⁰³ Article 3 of the EU Directive 2004/48/EC.

³⁰⁴ Tanzania is also a member of the Southern Africa Development Corporation (SADC) and these goods will eventually filter into countries like Malawi, Botswana, Zimbabwe, South Africa and other members of SADC.

³⁰⁵ The Uganda Copyright Act of 2006 came into operation in August 2006. This should at least check the levels of piracy as act introduces administrative (Section 41 of the Act) and enforcement structures as well as provide for criminal sanctions for copyright infringement. (Section 47 of the Act).

³⁰⁶ 2007 Intellectual Property Amendment Act of Rwanda and the 2006 Copyright Law of Burundi.

Secondly, the criminal sanctions are an important aspect of copyright enforcement to ensure deterrence through punitive measures. Music piracy is a very lucrative business with relatively low risks and high returns.³⁰⁷ It would thus not be enough to get compensatory remedies as the pirates would settle the claim and move to a new location.³⁰⁸ The EU Directive still shies away from giving specific provisions with regard to criminal enforcement.

The two main regional organisations that deal with Intellectual Property law, OAPI and ARIPO have very little on the enforcement of copyright and related rights. ARIPO just recently included copyright and related rights into their mandate and is also silent on the enforcement.³⁰⁹ There are however, common administrative measures and penalties for infringement and they also facilitate the establishment of criminal and or civil liability.³¹⁰

The treaties that establish and govern these organisations have little to say on the enforcement especially with regard to copyright. ARIPO was established to deal with matters related to industrial property and copyright was a recent inclusion.³¹¹ OAPI on the other hand only dealt with administrative issues of copyright. Like previous

³⁰⁷ See paragraph 2.5 and paragraph 3.3.5.

³⁰⁸ In the *Microsoft v Microskills Case*, (unreported) the defendants filed for bankruptcy, closed the business after the court awarded damages to the plaintiff for copyright infringement. The defendants subsequently opened another business under a different name and continued to trade. Interview with Mr. Sylvester Okello, State Counsel, Copyright Office, Kenya in June 2004.

³⁰⁹ The ARIPO Governing Council met in Dar es Salaam, Tanzania in November 2003 and agreed to extend the mandate of the of ARIPO to include copyright and related rights. The author was present during the meeting. However, they member states were not clear as to what this would entail. During a recent visit to the ARIPO headquarters in Harare in April 2007, the author had the opportunity to discuss the issue with the Deputy Director General of ARIPO. Although the office has been created, ARIPO is yet to employ an officer to deal with copyright matters. See Chapter 3.

³¹⁰ Enyina S. Nwauche, (2003). *An Evaluation of the African Regional Intellectual Property Rights Systems. Journal of World Intellectual Property*. Vol. 6 January, pp. 101-125.

³¹¹ *Ibid*.

international legislation prior to TRIPS, the regional bodies left the enforcement to individual member states.

4.3.1.3. Impact of International Laws on Domestic Legislation in Sub Saharan Africa

The development of international copyright law was more or less influenced by the existing domestic law. This was the case with the Berne Convention, which sought to harmonise the existing national laws in Europe at that time. The TRIPS Agreement is yet another example of an international law that was influenced to a large extent by the existing legal framework within the United States.³¹² Copyright laws in developing countries on the other hand were and continue to be influenced by the developments in international copyright as illustrated in Chapter 3.³¹³ Although quite a number of countries had some form of enforcement mechanisms in place, the TRIPS Agreement ensured that they provided the minimum requirements.

Several countries came up with new copyright laws that had stronger enforcement provisions. For instance, in addition to civil and criminal procedures which were contained in 1966 Copyright Act of Kenya, the Copyright Act of 2001 made provisions for stronger administrative and enforcement structures. It created the Kenya Copyright Board that had an enforcement structure akin to the Nigerian Copyright Commission.³¹⁴

Other Countries like Tanzania and Zimbabwe passed new laws but the enforcement provisions were similar to the previous laws except for stiffer penalties and longer

³¹² For more on the same see Daniel Gravis *supra* footnote 122.

³¹³ See paragraph 3.2.

³¹⁴ See Paragraph 4.4.2 below.

custodial sentences.³¹⁵ Other laws had small or insignificant changes as they already had the required provisions.³¹⁶ The author is of the opinion that stronger laws together with enforcement mechanisms do not necessarily mean that there will be a higher degree of conformity and less infringement especially in the music industry.

The law is just one step in the process of ensuring the enforcement of copyright. There are practical considerations that will be analysed in greater detail in Chapter 5.

The provision of good laws does not necessarily translate to efficient enforcement. The laws however provide the basis for enforcement. In addition to provisions on infringement, copyright laws lay out the remedies available to rights holders and in some instances the structures and procedures for enforcement. A brief examination of specific laws will provide an insight into the legal enforcement mechanisms within the continent.

4.3.2. Civil Remedies and Criminal Sanctions

The main function of civil remedies is to restore the balance by trying to place the aggrieved party in the position he would have been had the infringement not taken place. Criminal sanctions on the other hand are meant to punish and deter the infringer. Copyright laws may be enforced through use of both criminal and civil sanctions.³¹⁷ Intellectual Property rights are generally considered to be under the realm of proprietary rights and infringements are considered to be torts. Criminal

³¹⁵ Tanzania Copyright Act 1999, Zimbabwe 1999.

³¹⁶ Nigeria, South Africa and Malawi.

³¹⁷ In most jurisdictions however, copyright is regarded as a tort, save for the criminal offences created by various copyright laws.

sanctions have not always been available to rights holders.³¹⁸ Infringements are dealt with as civil violations. Criminal sanctions are applied in cases where infringements are deemed criminal.³¹⁹ They may be monetary or non-monetary or a combination of both. Monetary sanctions include fines that are awarded by courts while non-monetary include custodial sentences and other non-custodial punishments such as community service and reputation penalties.³²⁰ There are various civil remedies available under the national laws which include injunctions, damages, and account of profits, delivery up, search and seizure as well as the Anton Piller Orders.³²¹ These are critically analysed in paragraphs 6.2 to 6.5.

One might argue that copyright infringement should be dealt with through civil litigation. There are certain countries, which do not criminalize copyright infringement.³²² Various reasons exist for criminal enforcement of copyright; First, criminal sanctions are necessary to curtail infringements that would otherwise not be

³¹⁸ It was not until 1906 when the Copyright Act of 1902 in the United Kingdom was amended to include criminal offences in copyright infringement. 1906 Act (c.36 s1 (1) made the dealing in pirated sheet music an offence. It was punishable on summary conviction by a fine as well as imprisonment for the second offenders. This was consolidated in the 1911 Copyright Act as well as the 1956 Act of the United Kingdom. These two Acts were instrumental in the shaping of the copyright laws in the Anglophone countries in Africa. See Chapter 3.

³¹⁹ In the European Union, although the law provides for both criminal and criminal sanctions, there is usually a difficulty in drawing the line between the two. In most of the jurisdictions, IP infringement is considered a civil breach. Criminal sanctions will be reserved for cases of severe breaches. See Roger Lowe, (2004). Intellectual Property-Proposed EU Directive-Measures and Procedures to Ensure the Enforcement of Intellectual Property Rights.' *E.I.P.R* 26(7), pp. N116-117.

³²⁰ According to Steven Shavell, sanctions for criminal offences include imprisonment, various other non-monetary sanctions, fines and social sanctions associated with being labelled a criminal. See "Economic Analysis of Public Law Enforcement and Criminal Law" Working paper 9698 NBER Working Paper Series May 2003 Chapter 24, 2 available at: <http://www.nber.org/papers/w9698> (last accessed July 2006).

³²¹ Typical civil remedies available under the English law for copyright infringement are injunctions, damages or account for profits and delivery up of infringing articles. In criminal infringement cases, the laws provide for fines, imprisonment, limited amount of compensation and delivery up of infringing copies. Section 108, CDPA 1988 See G. Harbottle, (1998). Private Prosecutions in Copyright Cases: Should they be stopped *E.I.P.R.*, 20(8), 317-320.

³²² The Minister for Trade and Industry in Kenya, Dr. Mukhisa Kituyi noted that the lack of criminalisation of copyright in Uganda and Tanzania was hampering the enforcement efforts especially on the Kenyan side and called for the harmonisation of the laws. See The Daily Nation 27th April 2006. Uganda has since enacted a new law that criminalises copyright infringement.

adequately dealt with using civil sanctions. For instance, damages payable for copyright infringement might be negligible in relation to the transgression and custodial sentences would serve as a deterrent effect. Second, criminal enforcement would bring to justice those who would otherwise go unpunished.³²³ The use of custodial sentences such as imprisonment will have a higher deterrent effect as opposed to monetary sanctions. Governments by providing for criminal sanctions recognise the fact that individuals and corporations may lack resources to prevent infringement or secure compensation from infringement. Furthermore, since copyright is viewed as a public good, rights holders might not have sufficient incentives to address the social costs of infringement.³²⁴

The laws provide reasons for conformity and copyright laws are no exception. The question as to whether to use criminal sanctions or rely on civil remedies is crucial in enforcement of copyright within the music industry. There are various factors that determine one's choice.³²⁵ First, one has to consider available enforcement mechanisms, their powers and how they operate. The type of court that determines the cases, availability of law enforcement agencies such as police as well as their attitude towards copyright cases need to be put into consideration.

In most developing countries, the jurisdiction of the court is determined by the pecuniary value of the case. Copyright law sometimes stipulate which courts have the

³²³ In most developing countries, the defendants would in several instances use other tactics to avoid paying the damages. For instance, they would apply for bankruptcy or wind up the company before the case is concluded and the right holder is left with no possibility of recovering the damages. This happened in the Kenyan case of *Microsoft v. Microskills* Civil Case No. 323 of 1999. (Unreported).

³²⁴ See paragraph 4.3.2 and for further reading see Ben Sihanya. *Constructing Copyright and Literary Creativity in Kenya, op cit.* pp. 89-92.

³²⁵ Louis Harms. (2004). The role of the judiciary in the enforcement of intellectual property rights; Intellectual property litigation under the common law system with special emphasis on the experience in South Africa. WIPO/ACE2/4/Rev, *E.I.P.R.* 26 (11), pp.483-492.

right to determine copyright cases.³²⁶ The laws do not create special courts for determination of copyright cases which thereby affects the length of time that a case may be determined by the courts. Civil cases tend to take a longer time in comparison to criminal cases. Second, the relief available to the claimant is crucial. Civil actions offer immediate relief through injunctions and the promise of recovering the loss through damages might be more appealing to the copyright owner. On the other hand, criminal sanctions offer deterrent and often punitive remedies. Custodial sentences or hefty fines might deter future infringements of the rights. However, the claimant stands to gain nothing in monetary terms as fines are paid to the state. Fines and custodial sentences might deter future transgressions but the claimant is not compensated for the loss suffered.

Third is the cost of legal proceedings. In criminal cases, the State takes over the proceedings and bears the monetary cost of the same. The plaintiff is only required to make the necessary report to the police and the state mechanism takes over, from investigation to summoning witnesses as well as prosecuting the case. The plaintiff does not incur any costs apart from costs incurred to attend the proceedings. In civil cases, the claimant has to consider the legal costs incurred during the proceedings such as filing fees, the cost of hiring a lawyer among others.

The cost might be prohibitive to the litigant and in some cases might end up being more expensive than the damages sought.³²⁷ Furthermore, there is the risk that if one loses the case they have to cover the costs of the proceedings. In many cases the

³²⁶ See paragraph 6.1 below.

³²⁷ Interviews with Mr. Rob Hooijer, former GM SAMRO, Julie Gill AI Records, Mr. John Asein Nigerian Copyright Commission and Mr. Aziz Dieng of Senegal.

claimant is not willing to take the risk and will either opt for criminal prosecution or forfeit any legal recourse.

Fourth is the issue of proof. Common law liability is established on a balance of probability while in criminal cases the court prosecution has to prove the case beyond reasonable doubt. It is upon the alleged infringer, in civil cases to disprove the claimant's ownership.

Robin Fry sums up the advantages of criminal proceedings in as hereunder:³²⁸ One, the prosecution does not have to prove title; Two, criminal sanctions have a deterrent effect; Three is the costs are minimal as they are covered by the State. He however notes that there are disadvantages as well. The first is lack of discovery procedures while the second is inability to compromise or settle the case. Thirdly is lack of expertise on copyright matters within the judiciary. Fourth is lack of compensation to the rights holder and finally the burden of proof is on the prosecution.³²⁹ All these will be discussed in greater detail later when dealing with the challenges in enforcement of copyright in Kenya, Nigeria and South Africa in paragraph 6.7.³³⁰

Civil enforcement has its advantages over the criminal system and these, according to Friedman

include the following: One, civil enforcement of laws and in this case copyright, replaces the centralised government run system of catching criminals with a decentralised market. Some evidence points out that civil enforcement has a lower

³²⁸ Robin Fry, (2002). Copyright Infringement and Collective Enforcement *E.I.P.R*, 24{11} 516 –524. p.520.

³²⁹ *Ibid.*

³³⁰ See Garnett K, *et al. Copinger and Skone Jones on Copyright op cit.* p.1125.

cost than the centralised government machinery.³³¹ It is based on the assumption that a purely civil system exists in the absence of the government machinery and would involve alternative dispute resolution mechanisms such as arbitration along with out of court settlement.

The second advantage is the fact that civil enforcement provides reimbursement to the person whose rights have been infringed. This is calculated in terms of damages or loss of profits. The promise of a reimbursement is enough for the rights holder to pursue a claim. It will give them the impetus to report a transgression of rights as the benefits outweigh any perceived risks.³³² The third advantage is the fact that the conflict of interest between the enforcer and his employees such as bribery or precautions to prevent bribery under current institutions is eliminated.³³³ This would apply to private enforcers such as the industry-based organisations that deal with infringements, especially unauthorised commercial use.

The purely private enforcement system is not without problems. For instance, damages are usually limited to actual damage suffered by the copyright owner, who is only limited to damages that will make him whole.³³⁴ This means that in the case of a perennial copyright infringer, damages will only be equal to the infringement for which he was apprehended. Any other infringements that are not subject to the claim will go uncompensated. To illustrate this point further, take the example of a person who is constantly involved in unauthorised reproduction and sale of music. He may be

³³¹David Freidman. "Rational Criminals and Profit maximising police: Gary Becker's Contribution to Economic Analysis of Law and Law Enforcement." found at http://davidfreidman.com/Academic/Becker_Chapter/Beck (last accessed on 6 September 2005).

³³² *Ibid.*

³³³ *Ibid.*

³³⁴ *Ibid.*

caught only one out of the ten times that he engages in “piracy”. The owner will only be compensated for the one time the infringer was caught and gets nothing for the other nine times that he was not apprehended.

There are instances where the infringer will not be able to pay the fine imposed and in most cases the rights holder can do nothing about it short of committing him to civil jail which might not always produce the desired result.³³⁵ The criminal system then comes to the rescue, as there is the possibility of punishing infringers who are judgement proof through custodial sentences.³³⁶

4.4. Conceptualising the Institutional Framework

4.4.1. Public and Private Enforcement of Copyright

Both public and private institutions may carry out enforcement of copyright and related rights. They investigate, prosecute and enforce the criminal sanctions and civil remedies. From an economic perspective, there are various reasons for the existence of public law enforcement.³³⁷

First, the cost of enforcement; this might be prohibitive in relation to the offence or claim. A private enforcer will be driven by the ability to maximise on returns and if

³³⁵ For further detailed analysis, see G. S. Becker and G.J. Stigler, (1974). Law Enforcement, Malfeasance and Compensation of Enforcers, 3 *Journal of Legal Studies* 1.

³³⁶ Criminal law enforcement was almost entirely a private affair in primitive societies. In England for instance in the 18th century, law enforcement was left entirely to the private enforcers known as the bounty hunters. Parliament had suggested that the main distinction between civil and criminal offences is that criminal offences, or at least they should be, those for which the offender cannot pay the appropriate fine. They should thus be targeted at those thought to be judgement proof.

³³⁷ For further reading on the public and private institutions in the enforcement of copyright see E. Brousseau. and C.Bessy, (2005) “Public and Private Institutions in the Governance of Intellectual Property Rights” in Anderson B. (ed) *Intellectual Property Rights, Innovation, Governance and the Institutional Environment*, Edward Edgar Publishers. Available at <http://brousseau.info/pdf/2004-CBED-Anderson.IPRPubPriv.pdf>. The chapter discusses the differences in performances among contrasted systems of property rights which depend on both the wording of the law and governance mechanisms that implement and complete the law. It approaches the subject from the perspective of Institutional Economics.

the cost of apprehending the offender is higher than the expected return, then the private enforcer is unlikely to pursue the claim. In copyright cases, the enforcer, in this case, the copyright owner or private organisation within the industry would find the cost of trailing and apprehending the criminal too high. Costs include investigation, arresting and confining the offender, raiding the premises as well as the cost of prosecuting the case in court.³³⁸

Public enforcement on the other hand is publicly funded and the cost is not a central issue as most public enforcement agencies such as the police operate on an annual budget from the central government. The cases will however be handled according to priority. Criminal cases involving drugs, murder and other capital offences will definitely take precedence over the criminal infringement cases in music.

The budget granted to public enforcement bodies tend to be small in relation to the potential gains from enforcement especially as appraised by a private profit making maximising enforcer. An example is the police force whereby the cost of enforcement of law is higher than the expected return from the private enforcer's point of view.³³⁹

Thirdly is the prospect of an innocent person being prosecuted by private enforcers mainly because the private enforcer is driven by the promise of reward per prosecution. Generally, the industry supports public enforcement. This is due to

³³⁸ See paragraph 5.1.1, 5.2 and 6.1.

³³⁹ This is the situation in Kenya, South Africa and Senegal. An interview with the Deputy Director of Police in Charge of Operations Kenya, in June 2005 confirmed this statement. Police rely on the central government for their operations. They are granted an annual budget and have to enforce various laws within the country. Private agencies often weigh the cost of the action before they can pursue it if it within their means. Mr. John Asein of the Nigerian Copyright Commission indicated that this was also the case in Nigeria.

various factors such as the cost of enforcement especially at individual level; unauthorised commercial use is considered an economic crime that has a negative impact on the music author, the economy and on culture. Increasing levels of illegal use of music as well as the link to organised crime requires more than private enforcement.

According to Posner, a major criticism of public enforcement is that it creates incentives for bribery and corruption because the gain to the enforcer from enforcement is generally less than the offender's potential penalty. Indeed, cases of corruption within public law enforcement in copyright cases abound. From an industry perspective, public enforcement has its shortcomings. The success rate of copyright prosecution cases is quite low due to various factors such as lack of knowledge of copyright among the lawyers, police and the Judiciary.³⁴⁰ This would lead to wrongly drafted charges and other technicalities that would have cases dismissed.³⁴¹ It could also be attributed to the general altitude of the society as a whole to copyright infringement, as it would not be seen as a criminal offence.³⁴²

The role of private enforcement of laws is two fold, first, private suits can be used for purposes of stopping an infringing act, deterring future infringements as well as correcting socially harmful violations of the law. Second, private enforcement serves to compensate rights holders for harm or damage occasioned by the infringement of

³⁴⁰ Marisella Ouma, (2006). "Copyright in East Africa". Paper presented at the East Africa Intellectual Property Conference November 3, 2006, Serena Hotel, and Nairobi. The conference drew participants from both the private and public sector including industry organisations. The participants were concerned about the lack or limited knowledge within the legal fraternity. These sentiments were echoed by Hon. Justice J. Ntabgoba in his paper during the National Sensitisation Workshop on the New Copyright Act of Uganda July 20, 2007 at the Grand Imperial Hotel, Kampala (both on file with the author).

³⁴¹ This is true in developing countries, which are yet to develop serious copyright litigation.

³⁴² See Paragraph 4.2.2.

the rights. The infringer is compelled to comply with the law, make restitution and perhaps pay damages or civil fines.

These two functions are normally intertwined.³⁴³ There are many reasons for existence of private enforcement of rights using existing legal mechanisms. Private enforcement can increase resources devoted to law enforcement and in a way complement the Government enforcement efforts. Private parties are in some instances in a better position to monitor compliance of copyright laws and detect violations. This is attributable to the fact that most private agencies are specialised in a particular area. A good example is the South African Federation against Copyright Theft (SAFACT).³⁴⁴ They are in a better position to monitor and identify violations or infringement of their rights.

The Government might not be able to monitor such violations effectively and thus would rely on the private enforcers. For instance in the music industry, the Government often acts on information supplied by the private enforcer such as the Anti Piracy organisation and is able to follow up on the violations.³⁴⁵ This contrasts with the situation in the public sector where the agencies are set up to deal with a broad spectrum of issues.

³⁴³ Mathew C. Stephenson. (1994) Public Regulation of Private Enforcement: The Case for expanding the role of administrative agencies. *Virginia Law Review* Vol. 91:93 93-170 p. 96 Stephenson's paper focuses more on enforcement federal laws in the United States and with a specific interest to the Environmental laws. The literature is however relevant to the research as he deals with pertinent issues with regard to private enforcement of law, which can be applied to copyright and related rights.

³⁴⁴ See paragraph 5.6.1.

³⁴⁵ See IFPI Reports. The raids conducted in South Africa came up after the IFPI informed the police and customs officials on the consignment. The infringing consignment might have been able to get through customs and into the market undetected by the public agencies. See M.C. Stephenson, *op cit* p.108. and M.A. Cohen and P.H. Rubin, (1985) Private Enforcement of Public Policy, 3 *Yale J. on Reg* pp. 188-189. p.167.

The police force has the role of enforcing all laws in a particular jurisdiction and is unlikely to be specialised in one area of the law.³⁴⁶ The State may however make provisions for specialised enforcement agencies such as special IP courts or enforcements units such as the copyright inspectors who are specialised in the requisite area of law.³⁴⁷ Specialisation is desirable for law enforcement agencies as it reduces inefficiencies that might be occasioned by lack of the same.³⁴⁸

Private enforcement faces various challenges and has its own disadvantages. One, availability of resources might hinder enforcement efforts by the private enforcer. This is due to the fact that rights holders in the industry especially in Africa lack monetary and administrative resources to follow up enforcement procedures. Producers in Kenya formed the Kenya Music Anti Piracy Association (KEMAA) deal with unauthorised reproduction and sale of music on behalf of its members. Mr. Japheth Kasanga and Mr. Gabriel Torome who were founder members of the organisation admitted that they had to get funds to run the outfit from their members and this was sometimes difficult. Limited funds affected their ability to carry out sustained enforcement actions and in 2003, the outfit became dormant. The two hoped that with the establishment of the Kenya Copyright Board (KCB), part of this burden would be eased, as the Government would deal with administration and enforcement of copyright.³⁴⁹

³⁴⁶ Except in cases where the State deems it fit to create a special unit that will deal with a specific area of the law such as the Anti Fraud Unit, Special Crimes unit etc.

³⁴⁷ The United States for instance has specialised courts that deal with intellectual property infringement which strengthen their overall enforcement of the said rights. Countries like France and United Kingdom on the other hand like most developing countries do not have specialised courts.

³⁴⁸ There has to be an economic justification for specialised courts. In Kenya the Government created commercial courts to deal with civil cases of commercial nature and this has eased the backlog of cases. In South Africa, the copyright infringement cases like other cases are dealt with in normal courts.

³⁴⁹ Interview with Mr Japheth Kasanga and Mr. Gabriel Torome, producers and members of the Kenya Music Anti Piracy Association in June 2005.

Public agencies, it is argued, have the capacity to sieve out non-meritorious cases and save on resources. This is debatable as private agencies tend to pursue cases which they view have merit and due to their limited resources will prioritise the cases. The role of public agencies is inferred as opposed to being explicitly provided for in the copyright laws.³⁵⁰ Public enforcement agencies include courts, police, copyright offices, customs and Standards Agencies.

Private enforcement agencies concerned with enforcement of copyright and related rights within the music industry include industry based organisations; Trade Unions and Collecting Societies.

While civil and criminal jurisdictions are legally distinct, in practice, the use of both private and public enforcement measures in enforcement of copyright, namely monitoring, detection, investigation and prosecution is a mixture of both the public and private enforcement.³⁵¹ Enforcement of copyright is not restricted to civil or criminal enforcement.

Having discussed private and public institutions, it is important to note that enforcement is not restricted to either criminal or civil enforcement. There are non-judicial forms of enforcement that can be used by rights holders and other institutional structures. Competent authorities such as customs, police and the copyright offices may take administrative steps to ensure that the rights are enforced without resorting

³⁵⁰ Agencies such as KEMAA and SAFACT draw their mandate from their members who grant them the authority to pursue copyright infringement cases on their behalf.

³⁵¹ See Gregor Urbas, (2005). Criminal Enforcement of Intellectual Property Rights: Interaction between Public Authorities and Private Interests. Christopher Heath. (eds.) *New Frontiers of Intellectual Property Law*. IIC Studies Hart Publishing: Oxford pp. 305-306.

to judicial procedures.³⁵² The advantage of administrative measures is that they do not ordinarily involve lengthy court procedures and infringement can be stopped immediately.

4.4.2. Public and Private Partnerships

From the foregoing, one can see that public and private enforcement are both necessary within the music industry. They both have their advantages and disadvantages and in real legal systems, both exist. Copyright enforcement is done through both private agencies and public agencies and in many instances, there is a collaborative effort between the two. Private agencies are mainly concerned with investigation and monitoring of infringement activities. In turn public agencies such as police, courts and customs are concerned with apprehension of alleged infringers, prosecution along with determination of copyright cases.

Copyright is a public good as well as a private property. The role of each agency in the public and private sector is clearly set out. The rights holder has a choice of either instituting civil proceedings as an individual or reporting the infringement to public agencies that would proceed based on the information handed over by the rights owner.³⁵³ Sometimes, the cost of monitoring and instituting proceedings might be too much for the individual to bear. In such cases, the individual would join an industry association or get a private agency to pursue the claim on his behalf.³⁵⁴ In the

³⁵² See Part 3 of the TRIPS Agreement.

³⁵³ The laws provide for both civil remedies and criminal sanctions providing the rights holder with a choice. See the Copyright Act of South Africa, The Copyright Act of Kenya, The Copyright Act of Senegal and the Copyright Act of Nigeria. This will be discussed in greater detail in Chapter 5.

³⁵⁴ Examples are FACT in the UK, KEMAA in Kenya, Harry Fox Agency in the US, and IFPI among others. These organisations are formed mainly to ensure that the rights of the members are enforced and they also bring the offending parties to justice through the existing public enforcement agencies.

following paragraphs, the author shall analyse both the private and public enforcement agencies.

Alliances have come up between private and public agencies to complement each other. Public agencies such as the police already have established networks within their jurisdiction. On the other hand, as private organisations are normally industry based, their networks are limited and they have to expend extra time as well as resources to enforce the rights. In such cases, it is possible for private agencies to work with public agencies. Private agencies will provide intelligence and public agencies will use this to track down violators, apprehend them and arraign them in court.³⁵⁵

Administration of anti piracy devices as will be discussed in paragraph 5.3 is another example of a collaborative effort between the public and private sector. In Ghana for instance, administration of the anti piracy security device is a collaborative effort between the Copyright office, the Inland Revenue Department, the Musicians' Union and the collective management organisation.³⁵⁶ Joint enforcement efforts are probably some of the most efficient ways of enforcing copyright.

As discussed above, private/public partnerships are crucial for enforcement of copyright as they complement each other in areas especially where the other is more skilled or has better resources. In the United Kingdom, there are very good examples

³⁵⁵ A good example of these public/private partnerships is the continuing collaboration between IFPI together with police and customs departments. See <http://www.ifpi.org/site-content/about/mission.html> for more information on the role of IFPI. IFPI has been instrumental in providing information that has led to the apprehension of the various offenders around the globe. Examples include the various raids. See IFPI Enforcement Bulletin archives at <http://www.ifpi.org/site-content/antipiracy/bulletin-archive.html>.

³⁵⁶ See Report on the Study visit to Ghana, on file at the Kenya Copyright Offices, Office of the Attorney General.

of these partnerships. In 2001, the police, BPI and IFPI shared intelligence, which led to the apprehension and conviction of two suspects who were involved in a major counterfeit CD operation in hand with credit card fraud.³⁵⁷

In the US, the USPTO has established an Intra Government Coordination Council made up of industry, other Government agencies and enforcement agencies. The council aims at forging effective partnerships and fostering better understanding to facilitate effective enforcement. Public agencies that are responsible for copyright enforcement are copyright offices, courts, police, customs, weights and measures, Bureau of Standards and any other public agency that might be mandated to enforce copyright laws in the country. Chapter 5 will provide a comparative study of the various institutions that deal with copyright enforcement in Kenya, Nigeria, Senegal and South Africa.

4.5. Suggested Framework for Effective Enforcement of Copyright

The question of what would constitute the effective level of enforcement of music copyright is central to the fight against unauthorised commercial use. As stated in the introduction, unauthorised commercial use has become a major problem in the music industry with inadequate or lack of efficient enforcement is seen to be a contributory factor especially in the developing countries.

The level of enforcement depends on the legal and institutional framework. Having looked at the theoretical aspects of enforcement, and dealt with the question as to why enforcement of music copyright in sub Saharan Africa is sub optimal, the author notes

³⁵⁷ The suspects were caught after an undercover agent investigating pirate CD traffic from Russia passed intelligence to City of London Fraud Squad. See UK Patent Office document, "Counter Offensive: An IP Crime Strategy" available at <http://www.patent.gov.uk/about/enforcement/ipbook.pdf>.

that for one to achieve the desired level of enforcement there must be laws in place with corresponding compliance. Effective enforcement involves a constant review of the current procedures to deal with the methods devised by the infringers to circumvent the law.³⁵⁸

Very rigid laws and enforcement systems are likely to be counter productive.³⁵⁹ A good enforcement system ensures a high degree of conformity to the law. This is dependent on the nature of the violation and how seriously it is regarded. Stringent enforcement procedures might be counterproductive while limited enforcement may lead to the law being rendered useless. There is a need to guard against excessive protectionism and curtailing the excessive demands of the right holders. Over protection can have a negative impact on the industry especially in regard to free movement of goods creating distortions to trade.³⁶⁰

Given that copyright grants the rights holders exclusive rights on their works, there is need to take into consideration the exceptions and limitations as well as flexibilities offered to the users. These provide a balance between the exclusive rights granted and access by the users. The use of technological protection measures (TPMS) is a case in point, whereas the user would initially be allowed to make copies of the music by law for private use, the TPMs will curtail this as they will have to either get authority or licenses from the users to make copies for personal use. Over protectionism may also give impetus to third parties to come up with ways of circumventing the law.

³⁵⁸ J.A.L. Sterling, *World Copyright Law*, *op cit.* p. 432.

³⁵⁹ Sybille Schlater, (2005). Copyright Collecting Societies in Developing Countries: Possibilities and Dangers in Christopher Heath, *op cit.* pp. 53-69.

³⁶⁰ For Further reading see Asein J. (1998-1999) 'TRIPS: Developing Countries and the Requirement of Appropriate Intellectual Property Enforcement Infrastructure' 7 *Nigerian Juridical Review* p 33-54.

The act of creation depends heavily on free flow of ideas and exchange of information. Globalisation of IP has limited access to information as well as knowledge and made it more costly. The degree and scope of copyright protection permitted should only be that which is necessary for the purpose of satisfying other values and goals: the creation of knowledge, the spread of knowledge, public access and public use.³⁶¹

The solution is to have laws that can be enforced within the existing institutional infrastructure. For sub Saharan countries, the issue of strengthening the laws does not arise. As the author illustrated in Chapter 3, copyright laws already exist. What is lacking is effective enforcement of copyright law due various factors such as limited institutional capacity and human resources. Enforcement of copyright in the music industry in sub Saharan Africa faces several challenges, which might prevent the establishment of an effective enforcement system. As discussed in the preceding paragraphs, effective enforcement of copyright is clearly lacking.

From the foregoing, effective enforcement of copyright will require a system that ensures the highest level of conformity to the law of copyright through the following:

- (a) An enforcement system that provides for both criminal and civil enforcement of copyright and related rights.
- (b) A public enforcement system that is knowledgeable in matters of copyright and related rights that include the judiciary, customs and police, as well as the copyright offices.

³⁶¹ Peter Drahos, (1996). *A Philosophy of Intellectual Property* Aldershot Dartmouth p. 12: See also the US Constitution (s.8 subs.8).

- (c) A well-informed public is also necessary as they are the ones who use the music thus need a positive perception of copyright and related rights along with the need to have maximum adherence to the law.
- (d) Criminal penalties such as fines together with custodial sentences need to be punitive and deterrent. Care should be taken so that the penalties are not too harsh to the extent that they are counter productive.
- (e) Procedures for enforcement such as the civil and administrative procedures should be simple and effective.
- (f) Coordination between the public sector and the private sector is important. This is because each sector has either the resources or expertise that the other does not possess and when combined can result in higher levels of enforcement.
- (g) Training of enforcement agencies on copyright and enforcement is crucial.

Effective enforcement would thus entail the highest level of conformity to the law, and deterrence at a minimal cost to the rights holders as well as the law enforcement agencies.

4.6. Conclusion

Effective enforcement of copyright is dependent on factors such as the political will, societal perceptions and the level of economic and technological development. It involves a constant review of current procedures to deal with the methods devised by the infringers to circumvent the law. An efficient law enforcement system would produce the desired level of deterrence with a combination of public and private

enforcement. The cost of deterrence should not exceed the benefits to be accrued by the rights holder. Ultimately, the effective level of copyright enforcement will ensure a high level of deterrence at minimal cost to both the rights holder and the law enforcement agencies.³⁶²

An effective enforcement system of copyright entails the elimination of piracy while creating an environment conducive for creativity and investment. The protection of copyright is not only important for promoting creativity but also for developing employment and improving competition among the creative authors.

This chapter provides a theoretical framework on enforcement. It examines the political, economic, social and technological factors that affect the enforcement of copyright and related rights.³⁶³ A critical analysis of the enforcement institutions in sub Saharan Africa will be used to test the hypothesis.

³⁶² There is a need to guard against excessive protectionism and curtailing the excessive demands of the right holders. Over protection can have a negative impact on the industry especially in regard to free movement of goods creating distortions to trade. For further reading see John Asein, (1998-1999) 'TRIPS: Developing Countries and the Requirement of Appropriate Intellectual Property Enforcement Infrastructure' 7 *Nigerian Juridical Review*, pp. 33-54.

³⁶³ See Paragraph 4.2 above.

CHAPTER 5. A CRITICAL ANALYSIS OF NON JUDICIAL ENFORCEMENT MEASURES IN SUB SAHARAN AFRICA

5.0. Introduction

Most sub Saharan countries do have modern copyright law.¹ These laws make provisions for legal procedures and institutional structures to facilitate the administration and enforcement of copyright law. The issue however, is the implementation of these provisions. In paragraph 4.2.1, the author discussed the legal framework as one of the factors that influence enforcement of music copyright. It is notable that an effective legal system is one that ensures a high level of conformity and penalises those who fail to comply by the law while at the same time compensate the rights holder. The author in Chapter 4 contends that the laws should ensure, *inter alia* that: First, the rights, limitation and exceptions are clearly stipulated. Second, infringement is clearly defined. The laws should also have express provisions for exceptions and limitations to ensure the balance between the rights of the rights holders and access to copyright protected works.² Third, there are provisions for administrative and enforcement mechanisms. Fourth, there are provisions for penalising the infringers and compensate the rights holders. Fifth, there are clear provisions for preventative measures to stop unauthorised commercial use of copyright protected works.

A study of the copyright laws in sub Saharan Africa indicates that copyright laws grant rights holders' exclusive rights in relation to their works. These laws, as the author discussed in paragraphs 3.3.4 and 3.3.5 provide for civil remedies as well as criminal sanctions in cases of copyright infringement.

¹ See paragraph 3.3.4.

² See paragraph 3.3.5.

The laws require enforcement mechanisms, which are executed by both private and public institutions. These institutions draw their powers from existing laws as will be discussed in greater detail.

Effective enforcement of copyright, from a political, economic, social and technological perspective involves existence of enforceable law as well as effective enforcement mechanisms in both private and public sectors. An effective enforcement regime, as discussed previously in chapter 4, ensures conformity to law. It involves a constant review of existing laws together with institutional structures (such as enforcement agencies) as well as embracing new procedures and technologies to reduce the incidence of non-compliance with the law. Legal provisions are not the issue; the problem arises with implementation and enforcement of law. This was well captured by John Asein as hereunder:

“The wide disparity in the attitudes of the legislative arm and the enforcement arm may be explained as a reflection of the lopsided nature of the strategy in the establishment of the required infrastructure. For meaningful intellectual property enforcement we should either adopt a comprehensive approach to the establishment of these infrastructures or work out an effective infusion plan. In the latter we have to identify the most central bureaucratic component of the State that can be entrusted with a consistent and serious commitment to the development of other domestic organs. Unfortunately, this may not always work out well where there is open rivalry between national agencies and the current low level of logistics and human capacity.”³

³ See John Asein. (1998-1999) ‘TRIPS: Developing Countries and the Requirement of Appropriate Intellectual Property Enforcement Infrastructure’ 7 *Nigerian Juridical Review*, pp. 33-54; Betty Mould Address. ‘A Decade of TRIPS-Enforcement Challenges’ Paper presented at the EU Conference June 23-24, 2004, Brussels.

From the foregoing, it is necessary to look at institutions that are charged with the responsibility of investigating and prosecuting copyright cases preventing infringing goods from being released into the channels of commerce as well as apprehending infringers.⁴ These include copyright offices, police, customs, standards organisations as well as industry organisations.⁵

5.1. An Examination of Administration of Music Copyright in Sub Saharan Africa: The Copyright Offices

One of the main challenges in enforcement is lack of effective administrative structures. Copyright offices in sub Saharan Africa are public offices mandated to deal with administration and enforcement of copyright and related rights.

One interesting feature about copyright offices is that they may be established under copyright laws within a particular jurisdiction or it may exist without such a legal provision. In countries like Canada, and the United States among others, copyright offices exist as established by the law.⁶ Germany, France and the United Kingdom all have copyright offices but the copyright laws do not expressly establish them.

There seems to be no distinct pattern as countries from both copyright and authors' rights systems either have them established under the law or not.⁷

⁴ See paragraph 4.4.1 above.

⁵ *Ibid.*

⁶ In Canada, the Registrar of Copyrights is established under s. 48 of the Canadian Copyright Act. In the US, Chapter 7 of the US Copyright Act 1976 provides for the administration of copyright and related rights by the Copyright Office within the Library of Congress.

⁷ See paragraph 3.1 above.

Recent amendments to copyright laws within sub Saharan Africa have made specific provisions for establishment of copyright offices. Copyright offices previously existed without any definite status and could be moved from one ministry or department to another.⁸ In Kenya, the copyright office, prior to the enactment of the 2001 Copyright Act was a section within the larger Department of the Registrar General and this, as we shall see in paragraph 5.1, was not a very desirable state and it did affect administration as well as enforcement of copyright.⁹

It is important to study the role of copyright offices in relation to enforcement of copyright. The copyright offices are important as they help with the investigation of copyright infringement cases, prosecution as well as implementation of preventative measures.¹⁰ In many instances, copyright offices established in countries like Kenya and Nigeria were as a result of the need for better administration of copyright and related rights. A major lesson from the analysis in paragraph 4.3 is that that institutions, whether created by the law or not are instrumental in the enforcement of copyright. Laws without the enforcement structures are redundant.¹¹

Most countries in sub Saharan Africa that inherited the copyright system did not provide for registration of copyright works, which could explain the lack of interest in establishing copyright offices. Countries under the civil law system like Senegal made clear provisions for copyright offices, which, *inter alia* were mandated to ensure that

⁸ A good example is Ghana where the office was moved from various government departments over the years.

⁹ See paragraph 2.5.4 above.

¹⁰ See paragraph 4.1.1 and the following paragraphs.

¹¹ This has been the case in countries such as Kenya, Zimbabwe, Tanzania, Uganda, Mali, and Senegal among others.

the rights of the authors were protected and to collectively manage their rights.¹² This created offices with dual roles, the general administration and enforcement of copyright and with its related rights as well as the collective management.

The role of copyright offices in enforcement of copyright has not been very clear and not much has been done in terms of policy in line with actual enforcement.¹³ Two factors are crucial in this regard. First, copyright offices are essential especially in formulating and enforcing policies as well as strategic planning. They also act as the link between other public and private enforcement agencies. Secondly, copyright offices can also be involved in enforcement at a more practical level. This includes administration of the anti piracy security devices and use of inspectors either from within the office or collaboration with other enforcement agencies such as police and customs officers.¹⁴

The placement of the copyright office within the government structure also varies from one country to another. This could be determined by economic and political factors. There are cases where copyright offices are part of a larger Intellectual Property office or separate entities. In the United States, the copyright office is separate from the patent office and is part of the Library of Congress. In the United Kingdom on the other hand, the copyright office is part of the Patent Office.

The parent ministry or government department that oversees copyright offices could be that dealing with trade, culture or legal issues, as is the case in Ghana. In cases where they fall under the department of trade and industry, these offices are usually

¹² Article 1 and 2 of Law no. 72-40 Copyright Act of Senegal.

¹³ See paragraph 2.5.3.

¹⁴ See paragraph 5.2 and 5.4.

part of the Intellectual Property office; South Africa provides a good example.¹⁵ In other cases, for example in Kenya and Uganda, they are located within the Ministry of Justice or the office of the Attorney General. Such offices could either be part of the main Intellectual Property Office or separate entities.¹⁶ It is common to find copyright offices within departments of culture. These countries often have a defined cultural policy and deal with music as a component of culture as is the case in Ghana, Senegal and Nigeria. In the recent past there have been debates as to which ministry or office is best suited to handle copyright matters as well as whether or not the offices should be separate from the Intellectual Property offices.¹⁷

On the other hand, international organisations such as WIPO advocate for a single Intellectual Property office which they argue will be more effective in dealing with this area in developing countries. They take into account resources available and consider the fragmentation of the offices a hindrance to development of Intellectual Property especially for the development partners who have to deal with various Government ministries.¹⁸

In the following section, the author shall critically examine various copyright offices in sub Saharan Africa and their role in enforcement of copyright in the music industry.

(a) Kenya

¹⁵ Example is South Africa.

¹⁶ Example is the copyright office in Kenya.

¹⁷ The former Registrar General in Kenya was of the opinion that the offices should be separate to ensure autonomy. This could be attributed to the fact that the Industrial Property office was then and still is more established than the copyright office and there were fears that if it were merged with the industrial property office, the copyright activities would be overshadowed.

¹⁸ This argument, in the author's considered opinion does not hold water, as the basic consideration is whether or not the office is able to carry out its duties efficiently. The issue of its location is a secondary issue. The main point to be considered is whether or not the office will be efficient regardless of the Ministry in which it is located.

In Chapter 4, the author examined the factors that affect the enforcement of copyright such as societal perceptions, political will as well as the social economic factors. This is evident in the structure and role of the copyright office in Kenya. The copyright office has in the past played a minimal role in enforcement of copyright attributed to the fact that copyright is viewed as a private right. In addition, the copyright office has lacked resources to administer and enforce copyright.¹⁹

Enforcement efforts were left to the rights holders and other government agencies such as police and customs. These efforts were not coordinated greatly hampering enforcement. In 2001, after several consultations between the Government and stakeholders, the KCB was formed to administer copyright within the country. The Act tried to ensure that all rights holders in the copyright sector are represented on the Board.²⁰ The KCB maintains a database on copyright works, verifies works that are imported into the country, and appoints inspectors and prosecutors to investigate and prosecute copyright infringement cases.²¹ The Board has resolved and will soon issue the anti piracy security device for all audio and audio-visual works.²²

The Kenya Copyright Board (KCB) has faced numerous challenges in the recent past in relation to enforcement of copyright. These have already been highlighted such as

¹⁹ For over 30 years, there was only one officer assigned to the copyright section within the department of the Registrar General. It was only after the establishment of the Kenya Copyright Board (KCB) that more officers were assigned to the copyright. Currently, the Board has 7 officers assigned to it, which are 19 persons less than the proposed minimal structure. The Kenya Copyright Board has proposed a structure of at least 26 members of staff to enable it effectively carry out its mandate under the Copyright Act No. 12 of 2001.

²⁰ In practice, such large boards have their shortcomings due to their large membership and tend to be less efficient. Even with the large number, there are some sectors within the copyright industry, which believe that their representation on the Board is not adequate. This is especially true of the music industry. Personal communication with Jennifer Shamalla, General Manager of the Music Copyright Society of Kenya, (MCSK), Nairobi on 15th February 2006 Japheth Kasanga and Suzanne Kibukosya, Directors, Kenya Association of Music Producers, (KAMP), Nairobi, 22nd February 2006.

²¹ The role of the inspectors and prosecutors will be discussed in greater detail below.

²² Sections 36, 39, 40, 41, 42 and 43 of the Copyright Act of Kenya. And Minutes of the Kenya Copyright Board on File at the Kenya Copyright Board Offices.

shortage of staff and limited funding. To ease this problem, the Commissioner of Police has appointed two police officers to work as copyright inspectors. Their appointment, as will be discussed in paragraph 5.1.1, has enabled the Board to establish an enforcement unit to investigate and prosecute copyright infringement.²³

The copyright office in Kenya reflects the societal attitudes towards copyright and related rights and the political as well as economic factors as discussed in paragraph 4.2.5. Prior to the establishment of the KCB, copyright was not considered a major issue and thus no administrative structures were put in place to ensure proper administration and enforcement. After the establishment of the Board, administrative structures were set up but effective enforcement as illustrated in this chapter is still to be achieved due to limited resources in terms of staff and funding.

(b) Nigeria

The Nigerian Copyright Commission (NCC) was established to ensure effective administration and enforcement of copyright in response to the prevailing needs within the copyright industry. It is mandated to deal with matters of copyright administration and enforcement. Prior to the establishment of the NCC, the copyright office was a unit within the Department of Culture. In 1988, the Copyright Act established the Nigerian Copyright Commission (then the Nigerian Copyright Council), which was inaugurated in August 1989.

Although duties of the NCC are largely administrative, there are specific duties that pertain specifically to enforcement of copyright especially within the music industry.

²³ Since the unit was established in October 2006, there have been more than 150 copyright infringement cases that have been taken to court. The unit currently works with other law enforcement agencies such as Customs, Police, Kenya Bureau of Standards, Weights and Measures as well as other private enforcement agencies.

First is the prescription of anti piracy security devices to be used with the copyright protected works.²⁴ Second is the appointment of copyright inspectors,²⁵ with police powers granted under the Copyright Act.²⁶ The role of the copyright inspectors is to investigate cases of copyright infringement in Nigeria and apprehend violators.²⁷ Third is creation of awareness as well as publicity on copyright and enforcement. Fourth is the actual enforcement of copyright.

The NCC also facilitates awareness programmes for rights holders and the public at large which helps in enforcement of their rights. A good example is the National Action against Piracy that was launched in 1991 under which the national anti piracy committee was launched. This in turn gave rise to anti piracy committees at national level. Their mandate was to educate the public on copyright as well as enforcement through raids, apprehension and prosecution of copyright infringers. In this way, NCC raises awareness on copyright and enhances enforcement and changes the social perspectives on copyright.

Levels of unauthorised commercial use in Nigeria are still high despite efforts that have been made by the government in terms of providing necessary legal and administrative structures.²⁸ According to John Asein of the Nigerian Copyright Commission (NCC), unauthorised commercial use continues to threaten the music industry.

²⁴ Section 18A of the Nigerian Copyright Act.

²⁵ Section 32A of the Nigerian Copyright Act.

²⁶ Section 32B(1) and (2)

²⁷ See Chapter 5.1.1.

²⁸ See paragraph 2.5.

This could be attributed to technology as discussed earlier in paragraph 4.2.4. The establishment of illegal optical disc manufacturing plants has enabled pirates to manufacture and distribute pirated goods. Initially, the goods came from countries in the Far East such as Singapore via South Africa and then shipped to other countries like the USA. The establishment of optical disc plants made it possible for optical discs to be manufactured in Nigeria then distributed locally and to other countries in the region. The penalties for unauthorised commercial use are not deterrent or punitive in relation to the profits that the pirate stands to gain from the sale of pirated goods. So although the country has strong legal, administrative and enforcement systems the levels of piracy are on the increase due to other factors as discussed above. High levels of corruption compound the problem which in turn affecting the efficiency of the NCC in administration and enforcement of copyright related rights.

(c) Senegal

In Senegal, the *Bureau sénégalais du droit d'auteur* (BSDA) is established under the Copyright Act. The BSDA is under the Ministry of Culture and Communication and all its officers appointed by the Minister for Culture. Unlike the Nigerian Copyright Commission (NCC) and the Kenya Copyright Board (KCB), BSDA also acts as the Collecting Society. Its role in enforcement of copyright can be deduced from Article 2, which empowers the BSDA to *inter alia* ensure protection of the material and moral interests of authors.²⁹ The BSDA can act on behalf of the rights holders.³⁰ Under Article 44 of the Act, BSDA has the powers to bring infringement proceedings against a third party on behalf of its members.

²⁹ In 1998, one of the BSDA projects financed by the World Intellectual Property Organisation (WIPO) was the promotion of awareness in the fight against piracy. See Report prepared for UNCTAD by Andy Pratt. (2004) "The Music Industry in Senegal: The Potential for Economic Development. 11th March 2004.

³⁰ Article 47 Copyright Act of Senegal.

This provision makes it possible for the office to act expediently on infringement cases without necessarily having to locate or try and get authority to proceed with court proceedings from the rights holder.³¹ In Kenya, Nigeria, and South Africa on the other hand, the copyright offices do not have the express authority to act without consulting rights holders. The complainant has to be present for a matter to proceed in court.³² BSDA works with other agencies such as the AMS to implement the anti piracy security device. The office has been instrumental in awareness creation among rights holders and users in Senegal.

According to Madam Sibi, the chief executive of BSDA, public awareness workshops are an ongoing program, which over the years have yielded some dividends. This is especially in relation to the anti piracy security device which was introduced in 2004.³³ She further notes that the office has been able to deal with cases of copyright piracy. However, Mr. Aziz Dieng, the Chairman of the Musicians Union of Senegal and Director at BSDA argues that unauthorised commercial use has continued to be a problem and this can be attributed to social and economic factors. The users, he says, argue that the cost of legitimate music is prohibitive and the illegal copies allow them to purchase their favourite music at an affordable cost.³⁴ They further argue that the distribution systems for legitimate music are hardly there or unreliable. This forces people to buy illegal copies as the legitimate copies are not easily available in the market.

³¹ BSDA has been able to make use of this provision to stop infringing activities. The author was unable to get case law on these actions.

³² This illustrates the point on the effect of legal provisions on enforcement of music copyright as discussed in chapter 4. It also stems from the fact that copyright is a private right and the rights holders are central to the apprehension and conviction of the infringer.

³³ This is based on an interview with Madam Sibi of the BSDA in Geneva, July 2007.

³⁴ Interview with Mr. Aziz Dieng July 2005.

The situation in Senegal not only highlights the disadvantages or challenges faced by public enforcement agencies but also the societal perceptions in relation to music and copyright. The prevailing economic situation also contributes to the effectiveness of copyright offices as enforcement agencies.

(d) South Africa

The copyright office in South Africa is located in the Department of Trade and Industry. Unlike the other three countries, South African Copyright Law does not create a separate statutory body to deal with administration of copyright and related rights. The copyright office within the Companies and Intellectual Property Registration Office (CIPRO) mainly deals with registration of copyright.

Administration and enforcement of copyright is largely an industry affair with some support from the Government, for instance, the appointment of inspectors by the Minister under the Counterfeit Goods Act.³⁵ It does not have an enforcement unit and relies on other law enforcement agencies such as the police and customs to implement the law. Their role is mainly administrative; however, they conduct research and recommend relevant changes to copyright law where necessary. The industry to a large extent monitors, investigates and prosecutes its cases with the help of police and customs officers.³⁶

From the above, the author notes that copyright offices in sub Saharan Africa are public offices whose main role is the administration of copyright and related rights.

³⁵ Interview with Mr. McDonald Netshitenzhe –Registrar of Patents and Copyright, DTI (Department of Trade and Industry) in November 2003.

³⁶ *Ibid.*

Enforcement of copyright, save for the case of Senegal is a recent mandate as illustrated by the case of Nigeria and Kenya. The above studies indicate that that enforcement by copyright offices is affected by various factors such as the societal perceptions of copyright, the political, economic and social conditions as well as technology. The copyright offices mainly deal with enforcement through investigations and preventative measures. They work with other institutions such as the police and the courts.

5.1.1. The Supporting Role of Copyright Inspectors

As seen in preceding paragraphs, the copyright office has a role to play in enforcement of copyright. Copyright offices rely on other law enforcement authorities such as the police, customs and trading standards to carry out their inspections, and the public prosecutors to prosecute the cases. Given the societal attitude towards copyright, the allocation of public resources to deal with copyright infringement cases especially in the music industry would be limited.³⁷ The police give priority to what are considered “serious” crimes such as drug trafficking, murder, and fraud. Failure to secure special units to deal with copyright infringement requires realistic solutions.

To counter these problems, countries like Kenya, Nigeria and South Africa have provisions for copyright inspectors.³⁸ The inspectors are the main enforcement officers within copyright offices with police powers. Copyright inspectors have powers to search and inspect any premises, which they suspect to have infringing

³⁷ See Paragraph 4.2.3 above.

³⁸ Section 32A, Nigerian Copyright Act, section 39 Copyright Act of Kenya, Section 22 Counterfeit of Goods Act of South Africa.

items or are being used to commit infringing activities contrary to the provisions of the relevant law.³⁹

The following paragraphs shall briefly examine the role of inspectors in enforcement of copyright in the music industry.

(a) South Africa

The Counterfeit Goods Act makes provisions for appointment or designation of copyright inspectors. Under the Counterfeit of Goods Act in South Africa, the Minister for Trade and Industry may designate any person he deems fit as an inspector for the purposes of the Counterfeit Goods Act.⁴⁰ These inspectors are drawn from existing public institutions such as the South African Revenue Authority thus cutting down on extra costs of employing new inspectors. However, this may have its shortcomings as discussed in paragraph 4.4.1 where the public agencies tend to allocate their resources in terms of priority.

The inspectors in South Africa can only exercise powers to inspect, search and seize where there is reasonable suspicion that there is an infringement. They have to obtain a warrant from the courts. The requirement of a search warrant does not seem to apply in cases where the inspector is a police officer or is assisted by a police inspector to search a vehicle. The requirement for a search warrant issued by courts is likely to cause delays in the inspection and search processes. Worse still the person suspected of carrying out infringing activities can get to hear of the impending inspection and move infringing items to another location.

³⁹ Section 40 Copyright Act of Kenya, section 32A (2) (a) Copyright Act of Nigeria, section 5(1) (a) of the Counterfeit of Goods Act of South Africa.

⁴⁰ Section 22 Counterfeit Goods Act.

To remedy this situation, the Act provides for certain circumstances where inspectors may carry out the search without a warrant. The search would be justified in cases where he has consent to search from a person who is competent to give the consent.⁴¹

(b) Kenya

The KCB appoints inspectors.⁴² This provision, like the one in South Africa does not restrict the designation of other law enforcement agents as inspectors. It seeks to utilise existing resources within the Government structure. The appointment of persons from other enforcement agencies may be more practical as they are conversant with general enforcement procedures. The inspectors in Kenya are empowered to seize the infringing items or contrivances used for the manufacture of infringing goods where he has reasonable cause to believe them to be infringing.⁴³

In October 2006, two Police officers were seconded to the KCB as inspectors and have been able to exercise their powers under the Act. However, the offices are few and have to work with other police officers to ensure that they carry out their duties effectively within the country. The allocation of resources within the Government departments is likely to affect the efficiency of copyright inspectors. The author contends that the number of staff in the unit limits the number of actions that can be taken by the office at any given time. For instance, due to limited human resources, they handle less than ten cases in a month. Lack of Government policy on copyright and enforcement is attributed partly to limited capacity in terms of inspectors.⁴⁴

⁴¹ Section 5(1) (a) of the Counterfeit Goods Act of South Africa.

⁴² Section 39 Copyright Act of Kenya.

⁴³ Section 41 of the Copyright Act of Kenya.

⁴⁴ It is notable that the two officers have received training on copyright and related rights thus are able to guide their colleagues in investigation as well as prosecution of copyright infringement cases.

In this context, the KCB has embarked on a series of awareness creation programmes within the police force to build capacity and ease the pressure on existing inspectors. Corruption in various institutions within the government has also affected the work done by inspectors. Edward Sigei, the head of the enforcement unit within the KCB further explains that the levels of corruption within the police force sometimes hamper their efforts of copyright enforcement. Witnesses and police officers in some stations take bribes from the alleged infringers and either destroy or tamper with the evidence or fail to arrest the infringer.⁴⁵ This discourages rights holders from pursuing criminal infringement cases.

(c) Nigeria

In Nigeria on the other hand, the Commission appoints its own inspectors who do not necessarily have to be from other law enforcement agencies.⁴⁶ They are employees of the NCC. John Asein of the Commission noted that the appointment of copyright inspectors was necessitated by various factors. First, the Nigerian Copyright Commission had to rely on existing law enforcement agencies, which was not effective. The police officers already suffered resource constraints and it was difficult for them to set aside resources for copyright enforcement. Secondly, music copyright enforcement required enforcement agencies that were knowledgeable in matters of copyright so as to handle the cases competently. By appointing inspectors, NCC has addressed this issue.⁴⁷ Under Section 32A of the Nigerian Copyright Act, the inspectors in Nigeria have police powers.

⁴⁵ Information on the same is on file at the Kenya Copyright Board Offices in Kenya.

⁴⁶ Section 32A, Nigerian Copyright Act.

⁴⁷ Interview with Mr. John Asein, Nigerian Copyright Commission, (May 2007), Dakar, Senegal.

Granting of police powers to copyright inspectors was not well received by some quarters. The granting of police powers to the inspectors was challenged as being unconstitutional in the case of *Nigerian Copyright Council v Musical Copyright Society of Nigeria*,⁴⁸ Okeke J. held *inter alia* that the Copyright Inspectors had police powers as conferred by Section 32A of the Copyright (Amendment) Decree 1999 and it was not in contravention of the Nigerian Constitution.

(d) Senegal

The Copyright Act in Senegal does not make any provisions for special inspectors but members of the police, customs or any other competent authorities, carry out their functions.⁴⁹

Challenges faced by inspectors in enforcing music copyright such as limited resources underscore the issues raised in Chapter 4 such as the economic and political factors that affect music copyright enforcement as well as the societal perceptions. Where the Government has limited resources, allocation of funds is prioritised and since copyright enforcement is not one of the priorities, limited or no funds will be allocated.⁵⁰

This confirms the argument by the World Bank that effective enforcement of copyright like other intellectual property depends on the income levels.⁵¹ In South Africa, the Government, by appointing inspectors from other Government agencies, has ensured that there is efficient utilisation of existing resources.

⁴⁸ Suit No. FHCL/L/43C/99.

⁴⁹ Article 47 Copyright Act of Senegal.

⁵⁰ A good example is Kenya where there are only 2 inspectors to deal with a population of more than 32 million. The situation can however be alleviated by training more police officers to work with the inspectors. The Nigerian Copyright Commission can appoint inspectors based on the needs assessment by the Commission.

⁵¹ See Paragraph 4.2.5.

The advantages of having in-house inspectors are numerous. The main advantage is the fact that since they are appointed specifically to deal with copyright matters, they will have a higher and more specialised input in the enforcement process. It reduces the process of investigating and apprehending the infringer. As discussed in paragraph 4.4.1, public agencies are more likely to take up the enforcement of copyright but resources will be allocated according to the priorities of an agency. Where the Government has resources as in the case of Nigeria, they can afford to engage the services of inspectors who deal exclusively with enforcement of copyright. In South Africa, the government has distributed available resources to enforce copyright. To this end public enforcement becomes quite efficient.⁵²

The role of inspectors from the foregoing may be summed up under the following headings; first is the power to enter, inspect and examine any premises that they suspect to have infringing goods or infringing activities. Secondly, inspectors have the powers to seize and detain infringing goods that have been found in the premises until the case has been filed in a competent court. Thirdly, they have the powers of arrest to enable them to detain the suspects until they have been handed over to the police or other competent authorities.

In Kenya and Nigeria, these are administrative procedures that do not require a court order reducing the red tape as well as increasing the efficiency of the inspectors. Copyright inspectors do not operate in isolation as they complement the police officers. The police also have a role to play in the enforcement of music copyright.

⁵² See paragraph 4.4.1.

5.2. The Supporting Role of the Police

The role of the police in the whole process of enforcement cannot be underestimated. By law, the police yield immense powers including powers to search premises which they suspect to have illegal dealings and arrest any person or persons suspected to be involved in unlawful activity. In the case of the music industry, they have the powers to arrest any person whom they suspect of committing acts of infringement, search premises and seize infringing items. In some jurisdictions like Kenya, they are also responsible for the prosecution of copyright cases in the lower courts.⁵³

The role of police in copyright enforcement in the music industry is very similar to that of copyright inspectors. They draw their powers from relevant laws within each jurisdiction.⁵⁴ The police have the authority to enforce all penal laws in sub Saharan Africa. Criminal infringement cases commence with the complaint made by the rights holder or his representatives to the police. The representative body in the music industry or the individual right holder may make this complaint.⁵⁵ The police have the powers to search premises and seize goods that are deemed to be illegal under copyright law. Searches may be conducted with or without a warrant. This is similar to powers granted to copyright inspectors.

(a) Kenya

⁵³ See Chapter 6.

⁵⁴ The South African Police Service draws its powers from the South Police Service Act, Act 68 of 1995, The Criminal Procedure Act and the Counterfeit of Goods Act. The Kenya Police get their authority from The Kenya Police Act, The Criminal Procedure code and the Copyright Act, Nigeria, Criminal Procedure Code.

⁵⁵ The various industry organisations have for a long time logged complaints with the police regarding the infringement of the rights of their members. An example is the KEMAA in Kenya, which would report cases of copyright infringement to the police on behalf of its members.

The role of police in enforcement of copyright especially in the music industry in several countries has not been exemplary. Mr. David Kimaiyo, the Director of Operations, Kenya Police attributed this to the limitations on public bodies especially in allocation of resources.⁵⁶ He noted further that many police officers are not aware of the provisions of the Copyright Act.⁵⁷ It was not possible to get data on how many cases of copyright infringement were reported to the police in the countries under study as they are not well documented. The police in Kenya, according to Mr. Sylvester Okello, in a recent interview, have often argued that they do not have the powers to act in copyright cases as the law did not give them express powers in this regard.⁵⁸ Mr. J. Gatui of the Kenya Police also raised this issue.⁵⁹ This is an interesting angle considering that police are empowered to enforce all laws within the country. It is the duty of law enforcement officers to familiarise themselves with the various laws that have been enacted by Parliament and need to be enforced.

Prosecution of criminal cases in countries like Kenya, fall under the Police Department but within the direction of the Office of the Attorney General or the Director of Public Prosecutions. This is however limited to the lower courts. Criminal prosecutions of copyright infringement cases may be determined by the Resident Magistrate's Court or the High Court.⁶⁰ Rights holders in the music industry blame

⁵⁶ Various discussions with Mr. David Kimaiyo, Director of Operations, Kenya Police. Mr. Kimaiyo is also a member of the Kenya Copyright Board (KCB) and the author has had several opportunities to have informal as well as formal discussions on the enforcement of copyright in Kenya.

⁵⁷ Following the discussion, the Kenya Police has now introduced copyright into their training curriculum and the CID training school invites KCB for lectures in copyright.

⁵⁸ Mr. Okello was the officer in Charge of Enforcement at the Kenya Copyright Board until September 2007.

⁵⁹ J.P. Gatui, (1990) "The Challenges in the enforcement of the Copyright Act" A paper presented on behalf of the Police Commissioner at a Symposium on Copyright Law 19-20 April 1990. As quoted by Bernard Sihanya. *Constructing Copyright and Literary Creativity in Kenya, op it.* p.99. The participants from the Police force also raised this issue during a Seminar on Enforcement of Copyright sponsored by Microsoft and the Kenya Revenue Authority (KRA) in March 2005, Nairobi.

⁶⁰ Section 39 (9) Copyright Act of Kenya.

police prosecutors for the high failure rate of the few criminal copyright cases which they attribute to what they term as incompetence and the general apathy in handling the cases. These range from faulty charge sheets that lead to cases with merit being dismissed on technical grounds, to lack of seriousness when handling the cases.⁶¹ In the unreported case of *R v Angeline Mbai*, the court dismissed the case on grounds that the charge sheet was faulty and ordered the music cassettes released to the accused party.⁶² It reflects the general attitude of the police when handling copyright cases especially those involving music.

This has a lot to do with the general attitude towards copyright and copyright infringement as discussed in paragraph 4.2.3 earlier and limits the level of prosecution. This is attributable to several factors. One is the filing of cases in courts with no jurisdiction, as will be discussed in Chapter 6, which results in cases being dismissed on technical grounds. Secondly, the courts treat copyright infringement like any other petty offences. These attract nominal fines or light sentences such as community service. Third is the problem of preservation of evidence. There are instances where the evidence is tampered with before the courts determine the matter.

⁶¹ The author had first hand experience while working at the copyright office in Kenya where several police prosecutors requested the copyright office to help them draft charge sheets that involved infringement of music copyright. They reasoned that they did not have a template in the law as provided for other offences in the Penal Code.

⁶² Unreported Criminal Case No 2431 of 2000. Nairobi. In this case, the charge sheet stated that the infringing goods were music cassettes while pre-recorded videocassettes were produced in court as evidence.

(b) Senegal

Police in Senegal have powers to search and seize infringing property once they have been granted court orders to do so. These orders are obtained through an application by the rights holder or the BSDA on his behalf.⁶³ Police can only conduct searches where they have obtained court orders. However, it is important to remember that the police also have powers under other laws such as the Penal Code and the Civil Procedure Code.⁶⁴ Aziz Dieng highlights the fact that the police work with the BSDA in copyright infringement cases. Although several raids and seizures are carried out, the rights holders choose to settle the matters out of court.⁶⁵

(c) South Africa

In South Africa, the police still play a major role, as the inspectors are limited in their activities by law.⁶⁶ Although inspectors in South Africa have powers to arrest infringers, they will only do so until the person is handed over to the police for processing of charges. Police have facilities and resources to detain and investigate copyright infringement. They have in the recent past been very active especially in joint enforcement programmes involving various law enforcement agencies. The South African Police Services (SAPS) has assigned the issue unauthorised commercial reproduction, sale and distribution of music to the Organised Crimes Unit, which is a specialised unit. This lends some level of expertise to the

⁶³ Article 47 of the Copyright Act of Senegal.

⁶⁴ The powers of the police are extensive which might be one of the reasons that Nigeria decided to grant inspectors the full powers of the police. One of them is the power of arrest upon suspicion of illegal activity.

⁶⁵ The author was not able to get data on the number of seizures and arrests made by the police from BSDA and the Police in Senegal. The police did not have records available as the cases had not been properly documented and archived. The seizures were also done in various regions in Senegal with no central documentation system. Language was also an issue as the author has limited knowledge of French.

⁶⁶ See Paragraph 5.1.1.

enforcement process as they are more informed on matters of copyright and related rights through the training they receive from the industry.⁶⁷

From the preceding analysis, the issues of societal perceptions, political will as well limited knowledge once again emerge. Copyright infringement, as stated in paragraph 4.2.3, is often viewed as a victimless crime. This is a perception that is evident in the way copyright cases are handled by various police departments within the region. The artists in Kenya, Nigeria and South Africa have complained that they have to go through a lengthy process to explain the “theft” of their music. The artists in Kenya added that once they report the matter to the police station, they are advised to go and settle with the other party.⁶⁸ Police officers in one of the central stations in Nairobi and Johannesburg admitted that they did not understand why copyright infringement should be treated as a crime and yet the owner was not divested of the original copy.⁶⁹ Some officers were not aware that copyright infringement was an offence. Several admitted having purchased unauthorised music and went on to explain that they did so because they were cheaper. They did not see why they had to obtain original music as musicians already had money and by buying the pirated copy, they did not prejudice the interests of the rights holders.

This is the kind of attitude that stems from limited knowledge of copyright and it in turn affects the enforcement of music copyright. Copyright offices, police and

⁶⁷ RISA Anti Piracy Report 2004. In 2004, the South African Police and Customs department seized a consignment of 6 containers of infringing cassettes at the Durban port, which were in transit from Singapore to Nigeria. They acted on information that had been relayed to them by the industry organisations.

⁶⁸ Interviews with various artists held in Nairobi in July 2005.

⁶⁹ The author had informal sessions with Police officers in two stations in Johannesburg (November 2005) and Kenya July 2005). She had to explain to the police officers what copyright entails, infringement and the penalties available under the law.)

copyright inspectors are part of the enforcement wheel within the music industry. There are other measures that may be taken by the rights holders through the Government institutions to combat piracy. These include, *inter alia*, provision of anti piracy security devices as will be discussed in paragraph 5.3.

5.3 Evaluating the Viability of Technical Measures: The Anti Piracy Security Device

The concept of the anti piracy security device as used in sub Saharan Africa was borrowed from Portugal. The system requires the use of an authentication device on audio and audiovisual works which are affixed onto the legitimate copyright works. This helps in identification of legitimate works from illegal or unauthorised works.

From practical experience in Ghana, Nigeria and Malawi, the use of the “banderol” as an anti piracy security device has not been successful due to the following;

- (i) The device was a simple sticker that was affixed onto the music cassettes and CDs. It did not have any security features;
- (ii) It was thus easy to replicate;⁷⁰
- (iii) The mechanisms for enforcement were not in place.

The success of the device is dependent on three factors: First, it requires coordinated efforts between the office administering the device and the rights holders especially the producers of sound recordings and the manufacturers. Second, it must be practical and not easily replicated in the market. In countries where the pirates are up to speed

⁷⁰ This as will be discussed in the paragraphs below, had to be revised to ensure that it was a tamper proof sticker which was difficult or impossible to replicate.

with technology like Kenya, Nigeria and South Africa, the device has to be one that is difficult to duplicate. In Malawi, the Hologram has replaced the banderol, as there have been instances where the “banderol” has been scanned by unauthorised third parties and used in the market.

In Nigeria, when the NCC first introduced the anti piracy security device, the banderol, within weeks counterfeit devices were available on illegal copies as well. In South Africa the recording industry has over the years used holograms as well as identification numbers on CDs.⁷¹ Third, the device has to be applied uniformly to all the works whether imported or locally manufactured. If some of the rights holders opt to not to have the device, it will complicate the issue for the users as well as the law enforcement agencies.

Malawi and Ghana have since changed to the hologram which is tamper proof and cannot be easily replicated as it has security features. Although it costs more than the “banderol”, it has been more effective in Malawi, Senegal, and Togo and more recently in Botswana.

The use of the anti piracy device as envisaged in Kenya, Nigeria and Senegal provides a good example of workable private/public partnerships in the enforcement of music copyright.⁷² However, there are several costs that have to be considered and whether or not these would affect the costs of the legitimate music in sub Saharan Africa. The cost of the banderol is eventually passed on to the users as the rights holders have to purchase the device from the authorised agencies.⁷³ The anti piracy security device

⁷¹ See the Recording Industry of South Africa online at: <http://www.risa.co.za>

⁷² See Paragraph 4.4.2 above.

⁷³ The actual cost of the hologram is approximately USD 0.00679 in Senegal which is negligible and does not significantly affect the price of the music carrier.

can only be attached to physical carriers and will not be of much use in the digital environment.

(a) South Africa

In South Africa, the authentication is purely an industry affair. The Recording Industry of South Africa (RISA) encourages its members to have identification of their music especially that on CDs. This is done in collaboration with the International Federation of the Phonographic Industry (IFPI). The genuine CDs have information for identification such as the RISA logo and South African Copyright information⁷⁴. The CD will further have an IFPI Source Identification Code (SID), which would feature in the inner ring of the mirror side of the CD.⁷⁵

The use of source codes is best used in identifying the plants where the discs were manufactured. The absence of these codes indicates that the discs are pirated. However, this might not always be the case as was witnessed in a recent raid in South Africa. In 2005, 505 000 discs with an estimated street value of South African Rand ZAR 50 million (about US\$ 7.5million) were seized. On inspection by the IFPI Anti Piracy Enforcement Coordinator, many of the CDs, although unauthorised, were found to have IFPI source codes.⁷⁶ The unauthorised third parties always try to find ways in which they can circumvent the existing measures.

(b) Kenya

The rights holders in the music industry currently have individual systems of identification of their works such as stamping their works with their logos or company

⁷⁴ This information found on the CD included information on the record company and who owns the copyright and the rights in the sound recordings as well as the reservation of the rights.

⁷⁵ See RISA website www.risa.org.za. For more information on the identification see IFPI Guidelines for determining legitimate product from pirate and counterfeit product 2001 www.ifpi.org/site-content/library/palm-print-english.pdf.

⁷⁶ Donaldson Howard, (2006) 'Pirates of the 21st century' published in the Sunday Tribune." South Africa, 16 October 2006: <http://www.sundaytribune.co.za>.

stamps.⁷⁷ These efforts are not coordinated and have so far not been successful in the reduction of music piracy and counterfeiting. Over the years, there have been several committees set up in Kenya to oversee the implementation of the system. In 1997, the copyright office set up the Banderol Committee.⁷⁸ The committee had various meetings and they recommended the inclusion of the provision for an anti piracy security device into the new law.⁷⁹ Recommendations of the Committee are reflected in the Copyright Act.⁸⁰ The provisions deal with the detailed implementation and administration of the system.⁸¹

The Act criminalizes commercial exploitation of copyright works without the anti piracy security device.⁸² The question has been raised whether or not this provision is in contravention of Article 5(2) of the Berne Convention. For one to apply for the authentication device, they are required to register their works with the copyright office. Secondly, the rights holders cannot sell distribute or offer for sale their works without the authentication device, which in effect can be viewed as a formality.⁸³

⁷⁷ This is a method that has been used by local producers such as Ogopa, Kassanga Productions, Samawati and Serenade to name a few.

⁷⁸ Members included the representatives from the recording industry, the MCSK, The Department of Culture, representatives from the audiovisual industry and the copyright office. It later incorporated members from the Kenya Revenue Authority and the Ministry of finance.

⁷⁹ Section 36 of the Copyright Act of Kenya 2001.

⁸⁰ *Ibid.*

⁸¹ The applicant, who is presumed to be the rights holder, is expected to apply to the Kenya Copyright Board for the authentication device. The authentication device shall be a tamper proof sticker issued by the Board with a serial number and shall be affixed onto the audio or audiovisual carrier. The choice of device was based upon the authentication device that is currently in use by the tobacco industry in Kenya. The authentication device has to be affixed at the point of production for works produced within the country and before they are released into the market. This would mean that the right holders have to prove ownership of the rights before they can be granted the devices. This part was meant to ensure that only the genuine music gets into the channels of commerce. The provision only applies to the works imported or manufactured for commercial purposes.

⁸² Section 36 (6) of the Copyright Act of 2001.

⁸³ In Ghana, the inclusion of section 25 into the Copyright Act 690 of 2005 was met with stiff opposition on grounds that it was against human rights. It was further alleged that the criminalisation of the sale without banderol curtailed the freedom of the rights holder to trade in his protected works. Despite this opposition, the Act became law in May 2005.

The author contends that the provision simply enhances the protection that the rights holders have and ensures that there is a way that the enforcement agencies as well as the users can identify the legitimate from the illegal copies.⁸⁴

The APSD is to be issued by the Kenya Revenue Authority (KRA).⁸⁵ There were various reasons for this. The KRA could be used as a collection agency as it is quite efficient in collection of taxes and this could be useful in administration of the authentication device through its vast and efficient network.⁸⁶ The revenue authorities have more secure systems and facilities with fewer gaps for that intent on getting the authentication device onto illegitimate musical works.

The copyright office, as we have seen in the previous paragraphs has limited personnel and implementation of the system will require employment and training of more personnel. The system requires various mechanisms to be put in place and rights holders are required to register their works with the copyright office.⁸⁷ The registration is voluntary and does not affect the statutory rights of the rights holders. However, the regulations seem to negate this provision. Regulation 11 states;

“The Copyright Register shall be *prima-facie* evidence of the particulars entered therein and documents purporting to be copies of any entry therein, or extracts there from certified by the Executive Director or any other officer

⁸⁴ See Rule 12(6) (a) which states that the anti piracy security device shall be used for securing the interests of the holder of copyright and related rights.

⁸⁵ Section 36 (2) and (3) of the Copyright Act.

⁸⁶ Because the copyright office was not secure, it was easy for the pirates to access the authentication devices and affix them onto their illegitimate copies. The problem was further compounded by lack of resources such as secure strong rooms and human resources. See Report on the Study Visit to Ghana, Copyright Section 2001 (on file with the author). The past mistakes that were made in the initial administration of the “*Banderol*” in Ghana served as a lesson for the administration of the anti piracy security device in Kenya. The copyright office initially administered the device but there were many loopholes, which the pirates took, advantage off.

⁸⁷ Section 5(a) Copyright Act of Kenya mandates the Board to maintain an effective data bank on authors and their works in Kenya. Regulation 8 requires the Executive Director of the Board to execute this provision by opening a Copyright Register.

authorised by the Board and sealed with the seal of the Board shall be admissible in evidence in all courts without further proof or production of the original.”⁸⁸

This provision could be interpreted to mean that proof of ownership lies with the registration of the works with the Board and the certificate of registration can be produced as evidence in court. Some rights holders could further interpret it as being in contravention of the Berne Convention as it places a formality as a prerequisite to the enjoyment of copyright. It also has the potential of creating conflicts in enforcement as a third party, other than the rights holder may register and obtain a certificate from the Board and use it to obtain the anti piracy security device.

The system at the moment only exists on paper. Although the Board was inaugurated in May 2003, the administrative structures are yet to be set up including the mechanisms for administration of the anti piracy security device. This is an example of how the discrepancy between the law and what exists in practice affects enforcement of copyright.⁸⁹ The music in the Kenyan market can all be classified as illegal as there are no works that have the authentication device as required by the Act.⁹⁰

In paragraph 4.2.1, the author noted that loopholes left by the law could be used by third parties to infringe copyright with the assurance that nothing will be done about it. The producers in Kenya are concerned by the lack of implementation of the anti piracy security device as required by law. It makes enforcement difficult, as identification of pirated goods is still a problem.

⁸⁸ Regulation 11 Copyright Regulations of 2004. Kenya.

⁸⁹ See Chapter 4 above.

⁹⁰ See Section 36 (5) as read with Section 36(6).

Moreover, they are worried that they, as legitimate rights holders risk being taken to court for not having the anti piracy security device in place. This does affect the efficiency of enforcement mechanisms as the well as the credibility of the Government to fight unauthorised commercial, reproduction, importation and distribution of music.

The main aim of the authentication device as noted earlier was to help in identification of genuine works and this would greatly aid the law enforcement agencies.

(c) Nigeria

The Nigerian Act creates three different offences with regard to the anti piracy device. The first offence is commercial exploitation of any sound recording or audiovisual work without the anti piracy device.⁹¹ This provision, like the one in the Kenyan Copyright Act is meant to ensure total conformity with the law and provide punitive measures for infringement. The second offence relates to importation and possession of unauthorised anti piracy security device or any contrivance that is used to produce an anti piracy device without the authority of the Commission.⁹² It was necessitated by the proliferation of counterfeit Anti Piracy Security Device (APSD) in the market which rendered the system ineffective, as it was difficult to distinguish genuine works from “pirate” copies. This provision also ensures that the devices are sourced from specific legitimate sources that have put in place the relative machinery to minimise the risk of getting counterfeit anti piracy devices.

⁹¹ Section 18(A) (2) Nigerian Copyright Act.

⁹² Section 18(A) (3) Nigerian Copyright Act.

The third offence states any person involved in the unlawful possession, reproduction or counterfeiting of any anti piracy security device as prescribed by the copyright Act is guilty of an offence.⁹³

Registration of the works is not mentioned in the Act or regulations but all persons legally engaged in the reproduction of sound recordings are required to apply to the Commission for accreditation before they can purchase any holograms.⁹⁴ The accreditation serves to enhance enforcement procedures by ensuring that only those with legitimate rights may import music into Nigeria. A similar provision exists for works that are imported into Kenya.⁹⁵

The question arises as to how the offices ensure that the licenses are indeed genuine. One has to keep in mind that since quite a number of countries in Africa are hardly considered as viable markets for international record companies as they do not have representatives or licensees in these territories. They have to come up with systems that can deal with fake licences. The other issue is the lack of organised music industries within the continent. It will be difficult for the Nigerian Copyright Commission to verify the authenticity of a licence from Kenya or Cameroon or Ghana. This is because as discussed earlier, the industry is fragmented and there is lack of a centralised agency to deal with such issues.

⁹³ Section 18 (A) 4 Nigerian Copyright Act.

⁹⁴ The construction of the regulations and the substantive law is such that it covers all the legitimate rights holders engaged in the legitimate reproduction of music. The Commission also has to certify that the importers of sound recordings are bona fide licensees or assignees and before the Commission issues an accreditation certificate, the importer has to produce evidence of his licence or assignment from the rights holder. Regulation 3 of the Copyright (Security Devices) Regulations 1999 Nigeria.

⁹⁵ Regulation 10 of the Copyright Regulation 2004 Legal Notice No.9 *Kenya Gazette Supplement No. 7*

The administration of the anti piracy security device is quite technical and requires trained and competent personnel. To this end, the NCC established a Technical Implementation Committee, which shall have such powers as conferred upon it by the Commission.⁹⁶ The main role of the Committee is to supervise the administration of the hologram in Nigeria.

(d) Senegal

The anti piracy security device can be administered without necessarily including it in existing legislation. In Senegal, the BSDA introduced the hologram system in 2001. The holograms are currently affixed to all legitimate copies of music in Senegal.⁹⁷ The rights holders have to apply and purchase the hologram from the Copyright office after verification. Between 2004 and July 2005, the number of genuine music cassettes sold rose from 300000 units to 1000000 units a year.⁹⁸ The Anti piracy security device will help the Government compute the actual sales of music and give a definite value to the music industry. However, there were mounting tensions between the Copyright office and the music producers who were of the opinion that the price of the hologram was too high and should be revised.⁹⁹ They also complained that there was no transparency on the part of the copyright office in regard to the money made from the sale of holograms.¹⁰⁰

⁹⁶ Regulation 6(2) provides that the members of the committee include the Director General of the Commission who shall be the chairman, a representative of the Inspector General of Police, a representative of the Comptroller General, Nigeria Customs Service and three representatives each from the music and film industry representing the interests of the authors and producers.

⁹⁷ Interview with Mr. Aziz Dieng of the BSDA Senegal.

⁹⁸ *Ibid.*

⁹⁹ The hologram sticker as at July 2005 was CFA 30 (Approximately USD 0.0679) per unit and the Music Producers wanted it to be reduced to at least CFA 10 per unit. At the time of writing the thesis, the issue had yet to be resolved. (The Exchange rate as per August 2008 was USD 1 to CFA 441.

¹⁰⁰ Interview with Mr. Aziz Dieng of the BSDA July 2005.

There are several shortcomings in the administration of the anti piracy security device. First, as mentioned above, the device can only be used on physical carriers such as the Music Cassette, DVD, CDs and VCDs. It cannot be affixed to music that is transmitted via digital format. Secondly is the cost of administration which is eventually included in the cost of purchase thus passed down to the consumer. In Kenya, the estimated cost of the administration of the device is Kshs 3 per device and legitimate music CDs retail at between Ksh 250 to Kshs 500 each (The exchange rate is 1UK£ to Kshs 126). This in effect will increase the price of the music CD by between 1.2 and 2.4 %. In countries like Malawi where it has been used for more than ten years, there was no significant change in the price. Where the device is easily replicated, however, the cost is likely to go up significantly as the rights holders have to use more sophisticated means such as holograms which are more expensive to produce.

In paragraph 2.5, the author highlighted the fact that the levels of unauthorised commercial use in sub Saharan Africa are estimated at over 90% in some countries. Technology has contributed to the state of affairs as it enables easy, cheap duplication and dissemination of music. The use of the anti piracy security device will only be limited to physical copies of music such as music cassettes, DVDs, VCDs and CDRoms. Administration of these devices requires trained staff and adequate resources. Copyright offices and other government agencies have to work with existing sector organisations such as CMOs, musicians' unions along with other industry organisations for data and verification of rights holders.

Enforcement involves a constant review of existing law and implementation of procedures to deal with new methods devised by the infringers to circumvent copyright law.¹⁰¹

5.4. Underpinning the Enforcement Infrastructure: Use of Border Measures

Part 4 of the TRIPS Agreement as discussed in Chapter 4 made specific minimum requirements for the enforcement of copyright and related rights for WTO member states. Countries in sub Saharan Africa as discussed in paragraph 4.3.1 have incorporated these provisions in their laws. New technologies, increased international trade in intellectual Property goods and availability of markets has affected the music industry both negatively and positively.

Countries like the United Kingdom, France and Germany among others all have strong IP regimes as well as effective enforcement mechanisms.¹⁰² Since offenders are at a higher risk of being apprehended in these countries, they opt to move to other countries where the legal and enforcement regime is not quite strong.¹⁰³ These illegal copies will eventually find their way into outside markets through various means including border points. In many cases, as the author has illustrated in paragraph 3.3.5, the unauthorised parties try to smuggle illegal works into the country through the borders. If border enforcement is weak, then these works can easily find their way into the market.

¹⁰¹ See paragraph 4.5.

¹⁰² Intellectual Property regimes in these countries have been in place for over 100 years. They have been revised to cater for the changes in technology as well as to protect the interests of the rights holders.

¹⁰³ See paragraph 2.5 and 3.3.5.

Infringement of copyright is not limited to territorial borders and illegal music can come in through various points of entry. Border measures have become a useful tool in dealing with this situation especially in case of music.¹⁰⁴ For instance, in Senegal, the Association of Producers suspects that most of the illegal music in Senegal comes from countries like Nigeria, Guinea, Togo, Tanzania and Sierra Leone.¹⁰⁵ Most scholars when discussing enforcement of copyright and Intellectual Property in general concentrate on enforcement measures covered in the preceding paragraphs and leave out border measures.¹⁰⁶

A close examination of implementation of border measures in sub Saharan Africa is necessary in discussing why the existing regime has failed to ensure effective enforcement of music copyright. It also seeks to address the question as to why copyright enforcement is sub optimal in the region.

(a) Kenya

In Kenya, the Customs Department relies on the provisions of the East African Customs Management Act in relation to the detaining of prohibited and restricted goods under other laws. The Customs Department in Kenya have in the past raised this issue with the copyright office. They relied on provisions of the Copyright Act prohibiting the importation of sound recordings by people other than rights holders.

¹⁰⁴ Unauthorised traders are known to reproduce infringing music from jurisdictions where the copyright laws and enforcement are weak or lacking and these goods are in turn smuggled into other countries where they are released into the channels of commerce. See Chapter 4 and Chapter 2.

¹⁰⁵ Pratt Andy, UNCTAD Report, *op cit* p. 25.

¹⁰⁶ See John Asein *Nigerian Copyright Law and Practice*, *op cit*. does not mention border measure in the chapter dealing with infringement and remedies available in Nigeria, (Chapter 7) J.A.L. Sterling *World Copyright Law*, *op cit*. briefly mentions border measures but is also very brief on the enforcement of copyright, (Chapter 14), David Bainbridge *Intellectual Property*, *op cit*. does not touch on the border measures to name a few. However, Garnet. K, *et al Copinger and Skone Jones on Copyright*, *op cit*. Chapter 23 has discussed certain aspects of the role of customs in enforcement of copyright.

In 2001, the legal department of the KRA indicated that they were waiting for the coming into force of the Copyright Act so that they may make the necessary changes to the implementing regulations in their law to enable them carry out the seizure of infringing music.¹⁰⁷

In Kenya, customs have been quite active in trying to prevent pirated music from getting into the market. In the last three years, customs has managed to seize thousands of pirated copies of sound recordings. In April 2001, 17 000 unauthorised copies of sound recordings were destroyed by customs. These originated from Pakistan and were mainly local repertoire. In this particular instance, the copies came from the same plant that had been used by the local producers to print the original copies. If these copies had found their way into the market, it would have been difficult for users or the enforcement agencies to distinguish them from genuine copies.¹⁰⁸ The customs officials have admitted that they face various difficulties in respect of pirated music.

One of the major complaints was lack of a central coordinating agency with regard to unauthorised sound recordings that were impounded by customs. The second concerned the procedure for impounding and detaining suspected pirated goods. Third was the identification of the unauthorised copies. When customs seized and suspended the release of suspected pirated goods, the importers would produce all documents required to clear the goods for the purposes of customs and excise. Subsequently, they would demand release of their goods.

¹⁰⁷ Personal Communication with Mr. David Ontweka, Legal Department, Kenya Revenue Authority in 2001 and Mr. Wairegi, Customs and Excises Department, Nairobi.

¹⁰⁸ Communication with Mr.CDM Kiratu, Head of the Anti Counterfeit Secretariat, Kenya Revenue Authority in 2003.

Getting rights holders to come and identify goods and institute necessary legal proceedings would sometimes take a long time. This would jeopardise enforcement procedures as customs can only hold the goods for a certain period of time after which they are required to release the goods to the importer. The problem is compounded by the fact that rights holders do not provide any security for the goods. To avoid incurring liability the customs officials collect the statutory taxes and release the goods to the importers.¹⁰⁹

According to Mr. CDM Kiratu, even with the above problems, Customs has managed to reduce the influx of unauthorised music through the border points. This is, however disputed by the representatives of the music industry. A quick survey of the market still indicates that illegal music of both local and international repertoire is still easily available from the market. It could be attributed to several factors. The first is that unauthorised third parties are smuggling the music into the market through means which have not yet been detected by the Customs officials especially through the airports.¹¹⁰ Second is the fact that they are acquiring technology that enables them to make pirated copies in the country.

So far no major illegal manufacturing plant has been unearthed in Kenya and illegal music could be the work of small-scale illegal outfits.

¹⁰⁹ This information is based on an interview with Rose Namu Senior Customs Officer then based at the Jomo Kenyatta International Airport in Nairobi.

¹¹⁰ The main sea-port of Mombasa recently acquired scanners and all containers at the port are scanned for their contents to verify declarations by importers. At the international airports, the Customs Officials are still using random searches to verify the contents of cargo coming into the country that makes it easy for some pirated material to get into the country undetected.

There are currently no statistics available from the Customs Department as to the number of illegal sound recordings that have been seized over the last four years.¹¹¹

The Customs Department in Kenya complained that lack of provision for indemnification in law has made Customs reluctant to deal with copyright infringement cases as they face the possibility of being sued by the importer if the rights holder does not prove his case and alleged infringing goods have to be released to the importer.¹¹² On the other hand, while acknowledging that the security would not only indemnify the Customs Authority but also stem off malicious applications, rights holders were of the opinion that this would discourage them as the volume of illegal music would require high security. It would be difficult for the rights holders to raise and discourage them from making applications for seizure and detention.¹¹³

(b) South Africa

The Counterfeit Goods Act of 1997 in South Africa is very clear on provisions regarding seizure of counterfeit or pirated goods. This provision however limits powers of Customs Authorities to situations where the rights holder makes an application to the Commissioner of Customs to have infringing goods seized or their release suspended.

¹¹¹ The Government of Kenya, through the Kenya Copyright Board has engaged the services of an expert, with the help of the World Intellectual Property Organization (WIPO) to carry out a study on the economic contribution of copyright industries to the Kenyan economy. This study is expected to be complete by October 2008 and will provide vital statistics within the music industry such as sales of legitimate versus sales of pirated goods.

¹¹² Communication with Mr. David Ontweka Legal Department, Kenya Revenue Authority (KRA).

¹¹³ Personal Communication with Mr. Gabriel Torome, Mr. Japheth Kasanga and Ms. Julie Gill of the Kenya Music Anti Piracy Organisation on diverse dates in 2001.

The rights holder must furnish the Commissioner with specimens of the legitimate works as well as sufficient information as to the existence and title to the work.¹¹⁴ In many instances, importers of music are licensees and or assignees and they may produce agreements to support their claims to the works.

Section 15(2) Counterfeit Goods Act of South Africa provides for indemnification of Customs and the amount of security is to be determined by the Commissioner. Once the Commissioner receives the relevant application with supporting documents, he may grant the request if he is satisfied with the information submitted.¹¹⁵

Customs authorities in South Africa have been very active in the last few years in relation to seizing unauthorised music imported into the country. As noted earlier, the Minister for Trade and Industry is empowered by the Counterfeit Goods Act to designate certain Customs and Excise officials as inspectors.¹¹⁶ Essentially, this means that the powers conferred upon inspectors in relation to unauthorised music apply to Customs officials who are designated as inspectors by the Minister. This enhances their scope, as they are not limited to the provisions of the Customs and Excise Act in exercising their duties.

Customs Authorities do not only seize illegal goods that are destined for South Africa but also those that are en route to other countries. In 2003, South African Revenue Services (SARS) together with South African Police Services (SAPS) Organised

¹¹⁴. Article 53 TRIPS Agreement states "The competent authorities shall have the authority to require an applicant to provide a security or equivalent assurance sufficient to protect the defendant and the competent authorities and to prevent abuse. Such security or equivalent assurance shall not unreasonably deter recourse to these procedures."

¹¹⁵ Section 15(3) Counterfeit Goods Act of South Africa.

¹¹⁶ Section 22 of the Counterfeit Goods Act of South Africa.

Crimes Units managed to seize illegal music that was en route from Singapore to Nigeria at various ports of entry. Between August and September, they had seized close to 1million infringing music CDs that were in transit from Singapore to Nigeria.¹¹⁷

Importation of music like other copyright works may be restricted where the rights holder gives a notice to the Commissioner of Customs to the effect that he is the owner of the work and requests that importation of such works by unauthorised third parties be treated as prohibited.¹¹⁸ This provision will only apply to published works which would constitute infringing goods had they been made in South Africa.

These issues are as will be examined below, are not unique to South Africa and Kenya. Senegal has to tackle similar problems in relation to border measures.

(c) Senegal

In Senegal, this provision of border measures is not much of a problem as the documents and reports by the police and BSDA may be produced to support the claim.¹¹⁹

Customs officials have traditionally been concerned with collection of revenue and supervision of imports and exports within a particular country. Goods are allowed into the country as long as the Customs and Excise Act does not prohibit them. Furthermore, customs authorities were reluctant to seize and detain goods without some form of security by the person claiming to be the rights holder to avoid liability

¹¹⁷ See RISA Anti Piracy Report (last accessed in June 2005) 2004 available at http://www.risa.org.za/risa.php?content=agm2004_antipiracy.

¹¹⁸ Section 28 Copyright Act of South Africa.

¹¹⁹ Article 50 Copyright Act of Senegal.

for wrongful detention. However, their role in illegal imports of music has become increasingly important due to the increased cross border trade in the same. Copyright prohibits third parties from importing copyright protected music. This has however illegal imports of music.¹²⁰ Music imported is not only foreign repertoire but also includes local music that has been reproduced outside the country. There are certain administrative measures conferred upon customs officers to help them enforce copyright.¹²¹

Customs officers in Senegal may seize infringing or suspected illegal imports of music upon being granted court orders at the behest of the BSDA. It is clear from the above provisions that customs officers may seize pirated illegally imported music in the following circumstances: One, where the rights holder applies to the Commissioner for Customs and Excise to seize and detain the alleged illegal imports. This is applicable in Kenya and South Africa. The second instance is where the rights holder obtains court orders to stop the release of goods to the person importing them. In the third instance, the customs officials may suspend release of goods where they suspect that the goods are in fact infringing copies. They then notify the rights holder who will then follow procedure laid down by law.

Collaboration between the customs department and other law enforcement agencies is important to ensure effective law enforcement. Like other government agencies, they are limited in terms of expertise and this is where public/private partnerships come

¹²⁰ See paragraph 2.5.

¹²¹ Customs can seize and destroy goods that are prohibited goods, either under the Customs Act, or which are illegal under any other Act, which makes them prohibited under Customs. By virtue of the goods being infringing under the copyright laws customs officials are empowered to seize and detain suspected pirated goods until a competent court can determine the matter. Their powers to search and seize infringing goods and their efforts complement those of the police and other enforcement agencies both in the public and private sphere. In the following paragraphs, the author will give a brief comparative analysis of the role of customs in the enforcement of music copyright.

into play as discussed in paragraph 4.4.1. Joint enforcement efforts are effective as agencies complement each other. This includes the police, copyright offices and even trading standards offices, as will be discussed further on.

5.5. Role of Trading Standards Offices

Standards organisations such as the Bureau of Standards and trading standards deal mainly with enforcement of standards within a particular country. The Bureau of Standards is mandated with the preparation of standards within a particular jurisdiction. They *inter alia* help in the enforcement of copyright through vetting of standards on the various sound recordings that come into the country. This however is not their core mandate and have to work with copyright enforcement agencies to ensure that their standards are not implemented on unauthorised sound recordings.

The advantages of having such a body are found in the implementation of quality standards at both the national and international level.

Standards provide guidelines for quality of goods and provision of services, providing basis for trade transactions. Trading standards can therefore be used in the enforcement of copyright in sound recordings basing their work on the measurement, and description of the goods. In the United Kingdom, trading standards have been instrumental in addressing the problem of unauthorised sound recordings.¹²²

¹²² Patent Office, Annual Enforcement Report 2004 pp. 54-56 available at: <http://www.patent.gov.uk/about/enforcement/annreport.04.pdf> The Trading Standards North West IP Group (TSNW IPG) is a partnership of 22 standards authorities in the North West of England. Its principal aim is to formulate and develop a joint policy and strategy for the region in IP matters and in response to the IP crime. Similar initiatives may be set up in countries in Africa although their structure may be quite different.

It is notable that quite a number of unauthorised music cassettes and CDs and DVDs do not meet the required quality standards and this can be prevented from getting into the channels of commerce.

The role of the standards office is to ensure that goods meet required standards as well as conform to health and safety requirements. The Kenya Bureau of Standards (KEBS), The Weights and Measures Department, the South African Bureau of Standards (SABS), The Standards Organisation of Nigeria (SON) and the Association Sénégalaise De Normalisation (ASN) are examples of standards organisations within the region. Enforcement of copyright is not one of their core functions but where the copyright works do not meet their standards they can take the necessary action. Their role is mainly administrative and they have to work with other enforcement agencies including police, customs and judiciary.

The Weights and Measures Department in Kenya has been particularly active trying to reduce piracy and counterfeits in Kenya. It does so through the Trade Descriptions Act viewed as a more effective remedy for rights holders. One of the main advantages is that it does not require court orders to stop the sale and distribution of goods that fail to meet the trading standards.¹²³

Most unauthorised sound recordings will not have details required by the Department such as the origin of the goods. The following illustrates the above point. AI Records, a local producer of sound recordings through the Weights and Measures Department impounded a consignment of sound recordings that were being imported into the country.

¹²³ For sound recordings, the Department will look at the quality of the sound carrier, the description of the goods and the source of goods.

The importer was found guilty as the sound recordings failed to meet the required standards, convicted and the Magistrate ordered the re-exportation of the goods to where they originated. Unfortunately, that could not happen as the consignment contained some phonographic material, which happened to be prohibited material¹²⁴

Most cases that have been successfully determined under this Act have been on counterfeit goods. In 2005, there were 83 raids conducted by the Department across the country and most of the goods targeted were those that infringed on trademarks. 26 criminal cases have been instituted in court out of which 19 have been concluded. Seven are still pending and six are under investigation.¹²⁵ The Department works with other enforcement agencies like the Customs Department, Kenya Bureau of Standards (KEBS), Kenya Police, the Kenya Industrial Property Office, and the Copyright Office under the umbrella of the Anti Counterfeit Secretariat.¹²⁶

KEBS has also been part of the enforcement structure although the author doubts its efficacy in dealing with music copyright piracy. It has established an anti counterfeit unit. One common issue raised by above enforcement agencies is lack of centralised efforts to deal with music copyright infringement in terms of legislation and institutional capacity. The passing of the Counterfeit Goods Bill, it is hoped will aid in the coordination efforts among the various enforcement agencies.¹²⁷

¹²⁴ Communication with Ms. Julie Gill in May 2002. AI records, which Ms Gill represents, happened to be one of the complainants in the case. The author was not able to trace the court file to extract the proceedings of the case.

¹²⁵ See Department of Weights and Measures/Counterfeit and Sub-Standard Goods available at: <http://www.tradeandindustry.go.ke/subsection.asp?ID=68>.

¹²⁶ The Anti Counterfeit Secretariat under was disbanded. The Ministry of Trade has tabled the Counterfeit Goods Bill in Parliament, which if passed into law will establish an agency to deal with matters of counterfeiting and piracy.

¹²⁷ *Ibid.*

The institutional framework as discussed paragraph 4.2.2 involves both public and private sector. The author in the following paragraphs assesses the role of private or industry based organisations in enforcement of music copyright.

5.6. A Critical Analysis of Industry Based Organisations in Enforcement of Music Copyright in Sub Saharan Africa

Enforcement of music copyright as mentioned earlier is not the preserve of public entities. There are other agencies in the private sector that contribute to effective enforcement of copyright. In paragraph 4.2.2, the author analysed the advantages and disadvantages of private agencies in enforcement of copyright. The following paragraphs will provide a practical example and deal with the question of why the existing institutions have failed to achieve an effective level of enforcement.

Private organisations include collective management organisations (CMOs), industry based organisations such as producers associations and trade unions.

5.6.1. Collective Management Organisations (CMOs)

Collective management organisations (CMOs) have the mandate to collect and distribute the royalties on behalf of their members. They draw their mandate from the assignment of the performing rights, broadcasting and mechanical rights from rights holders who make up their membership. In certain instances, the rights holders may assign their synchronisation rights to CMOS are well suited to enforce their members' rights.

Members grant them the power to institute legal proceedings against the infringers on their behalf.¹²⁸ Enforcement of rights by CMOs can either be through licensing of users such as broadcasting stations or it may be through the civil and criminal procedures on behalf of its members. Users of copyright protected music are expected to take out licences through CMOs, as individual collection of royalties would be very cumbersome.¹²⁹ Failure to obtain a license from the CMO constitutes an infringement of copyright.

The CMO can opt to enforce the rights through arbitration by relevant bodies such as the Copyright Tribunals as envisaged in the United Kingdom.¹³⁰ Tribunals in countries such as Kenya are only mandated to deal with issues that arise from licensing. It is largely assumed that these bodies are meant to determine cases where terms of licenses granted have not been agreed upon by users and CMOs.¹³¹ However, on a critical look at the same, one will see that this amounts to enforcement, as the tribunal will determine the status of the license. This is only limited to the licensing of performing and broadcasting rights.

CMOs avoid using litigation for enforcement of their member's rights and opt for more non-forceful methods such as negotiations and arbitration. This is due to costs of litigation and the length of time it would take to determine the cases. Furthermore, they are limited in their mandate to collecting and distributing royalties on behalf of

¹²⁸ Example is the BSDA in Senegal, which is empowered by the Copyright Act to institute infringement proceedings on behalf of its members. Article 44 of the Senegal Copyright Act.

¹²⁹ For further reading on Collective Management of copyright see David Sinacore-Guinn, (1993), *Collective Administration of Copyrights and Neighbouring Rights: International Practices, Procedures and Organisations*, Toronto: Little Brown and Company.

¹³⁰ Countries like Kenya and South Africa provide for the establishment of a Copyright Tribunal in their laws to determine disputes arising from the licensing schemes.

¹³¹ See section 48 of the Copyright Act of Kenya and section 29-36 of the Copyright Act of South Africa.

their members. However, there are circumstances where they are forced to go to court to enforce their rights as users such as broadcasting organisations and owners of entertainment spots refuse to pay for licences. In April 2007, the Copyright Society of Malawi obtained court orders to seize goods from the Malawi National Broadcasting Organisation for non payment of royalties.¹³²

There are however some problems that are likely to arise especially in litigation where they do not have tangible proof of infringement. This would occur in cases of live performances and broadcasts that rely on returns submitted by users and in certain cases users would withhold returns. CMOs have to obtain relevant court orders to compel users to produce evidence, or they may employ services of inspectors or certified agents to support their allegations.¹³³

Other CMOs ensure that enforcement of rights is included in the assignment of the rights. They may also make clear provisions for assignment in their Memoranda and Articles of Association. This depends on whether they are statutory bodies or government bodies, private or quasi government organisations.¹³⁴ CMOs may either institute proceedings in their own names or have rights holders enjoined as parties to the suit or they may sue on behalf of the rights holders. The ideal situation is where the law or the Articles of Association provide that the CMO can bring a suit in its own name.¹³⁵

¹³² For more information on COSOMA see <http://www.cosoma.org>. (Last accessed in May 2007).

¹³³ See Article 56 of the Cameroon Copyright Act, Article 50 of the Senegal Copyright Act. This applies more to CMOs that are departments or agencies within the Government structure found in most French Speaking Countries in Africa.

¹³⁴ PRS provides for the enforcement of the assigned rights See their Memorandum and Articles of Association <http://www.mcps-prs-alliance.co.uk/DocsRepository/3499/PRSMEMOART2003.pdf>

¹³⁵ Article 92 Copyright Act of Burkina Faso, Article 38(2) France Copyright Act.

CMOs deal with litigation arising from unauthorised public performance or broadcasting of works as well as reproduction and sale or distribution of unauthorised work.

From the foregoing, the author notes that CMOs have a role on enforcement of copyright on behalf of its members. CMOs that are best placed to deal with enforcement matters are those that represent the rights of the producers of sound recordings. The authors and composers, CMOs such as, the Music Copyright Society of Kenya (MCSK) and the South African Music Rights Organisation (SAMRO) deal with copyright enforcement as an ancillary matter. However, SAMRO has recently embarked on enforcement of copyright as one of the functions of the society.¹³⁶

The essence of collectivism is to ensure that costs are equally spread among members of the collective. This reduces the costs of enforcement and enhances the process. However, costs of enforcement might be higher than what the organisation can afford leading to the abandonment of cases, which may have merit. The choice by the CMOs of criminal remedies rather than the civil process described above is indicative of two things. First, they prefer to institute criminal cases, as they are likely to be determined faster than the civil cases. If convicted, the sentence serves as a deterrent to others. Secondly, the cost of pursuing the criminal case is negligible after investigations and the securing of the evidence.¹³⁷

The role of CMOs in enforcement of copyright law cannot be underestimated. The members usually assign their performing rights to the CMO. In which case, it may act

¹³⁶ See SAMRO Annual Report 2005 available online at <http://www.samro.org>.

¹³⁷ See Paragraph 4.3.2 above.

on behalf of members to ensure that unauthorised third parties such as broadcasting organisations do not exploit their rights. CMOs employ licensing officers who are charged with the responsibility of ensuring that users have licenses for the public performance and broadcast of these rights. Where the users fail to do so, the CMO may take them to court to compel them to pay.

An analysis of the CMOs in sub Saharan Africa will highlight the institutional set up and highlight specific challenges in enforcement of copyright in the music industry.

(a) Senegal

In Senegal, BSDA unlike the CMOs in common law jurisdictions is more involved in actual enforcement of copyright law. BSDA may act on behalf of rights holders to obtain orders from the courts to carry out searches and seize any suspected infringing goods.¹³⁸

The BSDA has the power to institute proceedings of copyright infringement on behalf of the rights holders. They may for instance apply to a court for orders to seize and detain infringing sound recordings. This system has been in place since 2004 and results have been encouraging as sales of legitimate music has increased from 300 000 music cassettes to 1 000 000 units if the sale of the “banderol” is anything to go by.¹³⁹ The BSDA is very active in enforcement faces several problems which are either administrative or due to political influence. In the first instance is a situation where radio stations fail to pay royalties as stipulated by law.¹⁴⁰ It thereby has an effect on royalties collected.

¹³⁸ Article 47 Senegal Copyright Act. See Chapter 5.1.

¹³⁹ See Paragraph 5.1 above.

¹⁴⁰ Article 2 of Law No 72 Establishing the Copyright Office in Senegal.

In turn this affects the enforcement efforts further curtailed by political intervention in cases where the offenders are apprehended but are let off the hook due to intervention of powerful politicians and government officials.¹⁴¹ To ensure the efficacy of the hologram, BSDA embarked on awareness creation campaigns and together with the law enforcement agencies, they have carried out raids and closed down stalls that were selling music without the hologram.¹⁴²

An association of producers was recently formed.¹⁴³ The producers of sound recordings are important in enforcement of copyright in the music industry as they are the ones who organise as well as provide the funds for recording, and marketing the artist. They need to protect their investments against the unauthorised users. It is thus in their interests to have a strong organisation to *inter alia*, enforce copyright in the music industry as is the case of South Africa

(b) South Africa

SAMRO is quite established and has a large revenue base but enforcement of copyright as it relates to piracy is not in their agenda. This may be explained by the fact that the unauthorised reproduction, sale and distribution of an album directly affect the producers of sound recordings. The composers, songwriters and publishers will be affected indirectly as the reduced sales in legitimate music will have an impact on the royalties they are bound to receive from the sales. Enforcement is therefore left to record producers as will be discussed further.

¹⁴¹ Frank J Penna, Monique Thorman, and Michael .J Finger, (2003). 'The Africa Music Project' in, Michael J. Finger *et al. Poor People's Knowledge, Promoting Intellectual Property in Developing Countries* Washington DC Oxford University Press p. 99.

¹⁴² *Ibid.*

¹⁴³ See Report prepared for UNCTAD by Andy Pratt. (2004) "The Music Industry in Senegal: The Potential for Economic Development. 11th March 2004. p. 24.

5.6.2. Other Copyright Industry Organisations

There are several industry-based organisations that deal with the issue of copyright infringement in the music industry. These are usually private organisations formed by various stakeholders within the music industry such as producers of sound recordings or publishers or even the authors and composers. The main objective of these organisations is to combat unauthorised commercial use of music in the music industry.

They could either be national or international with local affiliates.¹⁴⁴ They provide the intelligence and expertise, which it passes on to the law enforcement agencies such as the police and customs departments in turn used to apprehend the infringers. So far their operations have been successful in tracing infringers as well as their factories and destroying the infringing musical works as well as the equipment used in producing the same.

In sub Saharan Africa, IFPI only has operations in Nigeria. This is attributable to several factors. First, IFPI represents specific interests which are considered insignificant in Africa. Secondly, membership to IFPI in sub Saharan Africa is limited as the recording industry is not organised and there are very few countries with umbrella bodies such as RISA in South Africa and KAMP in Kenya.

¹⁴⁴ An example of an international organisation that deals with copyright enforcement is the International Federation of Phonographic Industry (IFPI), which has offices as well as local affiliates within the five continents. For more information about IFPI visit their website <http://www.ifpi.org>.

Thirdly, except for South Africa, the major record labels are unrepresented in sub-Saharan Africa. Independent producers dominate the market and are not members of IFPI.¹⁴⁵

At the national level, there are several organisations. In Kenya, for instance, producers of sound recordings came up with the Kenya Music Anti Piracy Association (KEMAA) solely for the purpose of fighting copyright infringement in the music industry in Kenya, which was growing to alarming levels.¹⁴⁶ KEMAA had the power to sue on behalf of its members. Producers' organisations such as the Recording Industry of South Africa (RISA) have units within that deal with copyright enforcement and provide legal advice to members on enforcement of their rights. These organisations complement public law enforcement agencies as well as other private agencies and individual rights holders in enforcement of copyright. The South African Federation against Copyright Theft (SAFCT) is another example of an industry-based organisation that was established to enforce copyright in the music and film industry in South Africa.

Record companies will invest heavily to try and stop unauthorised commercial exploitation of their sound recordings. Record companies, either internally or through their representative organisations will set up enforcement units.

(a) South Africa

The Recording Industry of South Africa (RISA) has established an anti piracy unit to deal with unauthorised sound recordings within South Africa.

¹⁴⁵ See paragraph 2.3 above.

¹⁴⁶ See paragraph 2.5.5 above.

The unit works with other enforcement agencies such as the Commercial Branch of the South African Police Service (SAPS), the Anti Smuggling Teams of SARS, Customs and Excise as well as private organisations. This is a good example of the public private partnerships in enforcement of copyright as discussed in paragraph 4.4.2.

The role of the Anti Piracy unit is to provide intelligence as well as raise awareness on effects of piracy on members and society as a whole. Since it was set up, there have been several positive results through co-operation with the other law enforcement agencies.¹⁴⁷ The situation in Kenya, as will be discussed below is slightly different from South Africa

(b) Kenya

In Kenya, the Kenya Music Anti Piracy Association (KEMAA) loosely represented the interests of the producers of sound recordings as well as artists.¹⁴⁸ Initially, KEMAA embarked on a countrywide campaign and orchestrated a number of raids, which resulted in various criminal prosecutions around the country.

In 2000, more than 14 cases were instituted in Nairobi. KEMAA faced many challenges in its efforts to restore some sanity in the industry. First, there were several independent producers who were sceptical about the objectives of KEMAA most of which stemmed from business rivalry and they would thus not back its activities. Secondly, police and customs departments were initially reluctant to carry out the raids and insisted on either getting a court order or a letter from the copyright office.

¹⁴⁷ Prior to the establishment of the unit, the industry relied on the Regional Anti Piracy Enforcement Coordinator (RAPEC) of IFPI. The coordinator had to cover various countries in sub Saharan Africa.

¹⁴⁸ Information on file with the author at the Kenya Copyright Board Offices, Nairobi.

Where they eventually got the co-operation of the police or customs officials, the courts would question their authority to institute the proceedings. Police would also insist that rights holders should be named as complainants and not KEMAA. Third was the issue of funding of their activities, as members were not willing to commit adequate funds for their activities.

In Chapter 4, the author noted that one of the disadvantages of the private enforcement agencies is the limited funding. Where the members are not willing to contribute, enforcement is likely to be inadequate due to limited resources. Fourth, most of the cases that were instituted after the raids were dismissed mainly on technical grounds after more than three years in court. This highlights the need to have police officers and prosecutors who are well versed in matters of copyright and enforcement as discussed in Chapter 4. The recording industry recently regrouped under the auspices of the Kenya Association of Music Producers (KAMP).¹⁴⁹

Musicians' trade unions have a role to play in enforcement of their members' rights. They may not be in a position to represent their members in court but they are important in identifying their members and their works especially in cases of copyright infringement. They are also able to advise their members to form organisations that would champion enforcement of their rights. In some countries, such as Malawi and Ghana, they work closely with other enforcement and

¹⁴⁹ Based on communication with Bruce Odhiambo, the Chairman of KAMP July 2005 and Suzzane Kibukosya a Director of KAMP. July 2005, Nairobi.

administrative agencies such as copyright offices and collective management organisations to ensure enforcement of their rights.¹⁵⁰

5.7. Public and Private Sector Collaboration in Music Copyright Enforcement

Public and private agencies discussed above have exhibited various shortcomings in enforcement of copyright in the music industry. The establishment of the Anti Counterfeit Secretariat within the Customs Department was meant to create a centralised office to deal with the unauthorised reproduction, sale and importation of music. The Secretariat draws its members from the various IP Offices and enforcement agencies within the Government, the IP Industry, Customs and Police. Since it was established four years ago, it has carried out raids on business premises and warehouses, seized and detained illegal sound recordings. Rights holders within the music industry argue that the Secretariat is ineffective. It has since been disbanded.

Industry organisations such as the ones discussed above provide assistance in developing legal conditions and technologies for the recording industry especially in the digital era and the promotion of music as an economic, social and as well as cultural as a tool for development. Although an organisation like IFPI it is active in 75 countries and has 48 affiliate organisations One reason for this is the fact that Africa is not viewed as a major music market. At the moment, the only country with an IFPI presence is Nigeria.

¹⁵⁰ A good example is the Musician's Union of Ghana (MUSIGHA) which works closely with the Copyright Society of Ghana (COSGA) and the Copyright Office to ensure the application of the anti piracy device on the sound recordings.

This is a perfect example of prioritisation of cases and areas of operation as one of the limitations of a private enforcement agency.¹⁵¹ IFPI will only invest their time and efforts in areas and cases where they are guaranteed maximum returns and together with some level of success. IFPI has been involved with some enforcement agencies in the region, namely South Africa and Nigeria, which have resulted in seizure of infringing music as well as arrests and institution of civil proceedings.

In 2003, the interception in South Africa by customs officials of a shipment of a shipment of infringing CDs in transit from Pakistan was possible through intelligence given by IFPI. They were also able to organise the training of customs and police officers in Nairobi in 2001 and 2005 in conjunction with the Government of Kenya and other industry players. In 2003, the Customs Department detained 15 135 VCDs and DVDs at the Port of Mombasa. This was possible through information communicated to the Department of Weights and Measures. The suspect was subsequently fined US\$ 2 500 or a one year jail term.¹⁵² In Nigeria, IFPI has also been able to work with Customs Authorities as well as the Police Department. The Nigerian National Group of IFPI was recently established to deal with growing levels of unauthorised commercial use in the music industry.

From the foregoing, it is important to strengthen public and private partnerships in enforcement of copyright. Public agencies may have resources in terms of infrastructure while private agencies may have expertise but limited capacity. Combining these resources may be a way forward in enforcement operations.

¹⁵¹ See Paragraph 4.4.1 above.

¹⁵² See IFPI Enforcement Bulletin available at: <http://www.ifpi.org/site-content/library/enforcement-bulletin-18.pdf>.

Enforcement is largely seen as the preserve of the private sector as has been the case in Kenya and South Africa or it may be left to the government agencies as in Senegal. Disadvantages occasioned by private enforcement or public enforcement are minimised.

5.8 Summary and Conclusion

This chapter has looked at the practical aspects of enforcement of music copyright in sub Saharan Africa. Enforcement structures are necessary to ensure that law is efficient. From the ongoing, it is clear that the issue is not so much in the substantive law but in enforcement. Lack of knowledge of copyright and related rights among rights holders, users and law enforcement agencies contributes to the low level of enforcement experienced in the countries under study.

Collaborative efforts between the public sector and the private sector provides a more effective way of enforcing the rights, by providing intelligence, expertise and technical support. The efficiency of copyright law depends on effective administrative and enforcement mechanisms.

The chapter critically examined the existing legal and administrative structures as well as their role in enforcement of music copyright. The efficiency of institutional structures both in the public and private sector are influenced by the economic status of the country and the rights holders. Societal perceptions on music coupled with political will as well as technological advances also contribute to enforcement in sub Saharan Africa.

The author, based on the critical analysis of the laws and enforcement institutions within sub Saharan Africa and the proposals in Chapter 4, proposes the following:

The first proposal, as discussed in paragraph 2.5.3, is the creation and enactment of a clear government policy on enforcement of copyright and related rights. A good policy is likely to provide a strong basis for administrative and enforcement mechanisms. The policy should seek to achieve an efficient level of compliance to the law and enforcement of the rights provided for by the law. It should incorporate the minimum standards of enforcement.

Second, the institutions charged with enforcement of copyright should be established based on the social, political and economic needs of the local industries as opposed to adopting systems from other jurisdictions. These should however be in line with the provisions of the TRIPS Agreement to ensure expedient and effective relief to the rights holders.¹⁵³

The third proposal relates to strengthening of public and private partnerships in enforcement of copyright. Public agencies may have resources in terms of infrastructure while private agencies may have the expertise but limited capacity. Combining the resources and expertise may be a way forward in enforcement operations. The disadvantages occasioned by private enforcement or public enforcement are minimised.¹⁵⁴

Fourth, the policy should take into account the role of the users. The users need to be well informed and made aware of copyright protection as well as the importance of

¹⁵³ See Paragraph 4.2.2 above.

¹⁵⁴ See Paragraph 5.8 above.

complying with the law. It should be linked to the overall economic, cultural and technological development within a given jurisdiction. The policy has to take into account advances in technology, which affect not only the creation of the works but also the mode of delivery and protection of the same.¹⁵⁵

Enforcement by police, customs, copyright offices and the private agencies in most instances requires the alleged infringers be taken to court. This could entail criminal prosecution, civil litigation or both. In Chapter 6, the author shall assess the role of the judiciary in enforcement of copyright in sub Saharan Africa.

The institutions analysed in this chapter are part of the enforcement process as they deal with the prevention, investigation and in some cases the prosecution of copyright infringement.

¹⁵⁵ See Paragraph 2.3 above.

CHAPTER 6 ENFORCEMENT OF MUSIC COPYRIGHT; THE ROLE OF COURTS

6.0. Introduction

Courts play an important role in determination of both civil and criminal cases on copyright. The traditional role of courts is to formulate and apply rules regulating activities that often are complex. In some countries like the United States and the United Kingdom, judges are instrumental in formulation of copyright policy through their judgments. The Judiciary is charged with interpretation and execution of laws. Remedies available through courts are wide and include awards for damages, preliminary relief, injunctions, fines and custodial sentences.

Judges and Magistrates need to be well versed in matters of copyright in order to effectively determine cases. In common law jurisdictions, judgements by higher courts are binding on subsequent decisions. Civil law jurisdictions decide each case according to the law and its merits and previous judgements are not necessarily binding but reference can be made to them.¹ The rights holder can either opt for civil litigation or criminal prosecution to enforce his rights.

Dr. Hassan El Badrawi has summed up the role of the Judiciary, as thus:²

¹In Germany for instance, although there is no formal rule of *stare decisis*, a lower court will rarely decide a case deliberately against the existing decisions. As a rule, lower courts in the civil law jurisdictions follow the case law that has been developed by the Supreme Court in the same way they follow the statute. See Paper by Dr. Joachim Bornkamm, (2004). "Intellectual property litigation under civil law system; Experience in Germany" presented at the Second Session of the Advisory Committee on Enforcement Geneva 2004 WIPO/ACE/2/3.

² Hassan El Badrawi, (2004). "Role of the Judiciary in the Enforcement of Intellectual Property Rights", Paper presented at the Second Session of the Advisory Committee on Enforcement, Geneva WIPO/ACE/2/6.

“The Judicial authorities play a pivotal role in the general organisation of modern societies. The more that role is efficient, the more stability will prevail and societal tensions diminish. Indeed, the role of the judiciary consists in securing respect for and sufficient enforcement of legislation protecting rights and freedoms. It is not sufficient that legislation establishes rights (through substantive provisions) or means for acquiring such rights (through procedural provisions) acquisition of rights, regardless of the means of acquisition, must be guaranteed through efficient channels of justice controlled by a solid authority capable of protecting the rights against violation or abuse.”

The court system is meant to ensure that laws that are set out to ensure rights are observed and any violators apprehended are brought to justice. It is part of the bigger enforcement mechanism and relies on both the rights holders and as well as other law enforcement agencies. In the case of civil litigation, a rights holder or his representative (where permitted) is required to file a suit against the infringer in court. Similarly, in criminal prosecutions, there has to be a complainant. The author observes that rights holders in the music industry have not used this option for enforcement due to various reasons such as limited resources, insufficient knowledge about their rights and the operations of courts.

Courts like other public enforcement agencies play a significant role in enforcement of copyright. It is through the courts that civil remedies and criminal sanctions for copyright infringement are administered. The structure of courts varies from country to country. Like other aspects of the legal system, these structures were influenced by common law and civil law systems. In most common law jurisdictions, courts have more or less retained the structures they inherited from the colonial regime.³ None of

³ This is the case found in countries like Kenya, Botswana, Malawi, Ghana, and Uganda, to name a few.

the countries under study have specialised courts that deal with copyright cases or intellectual property cases. The TRIPS Agreement requires member states to put in place equitable and expeditious remedies for copyright infringement.⁴ This does not in any way require member states to create new systems or courts to deal with copyright infringement cases. Nigeria, Senegal and South Africa, like most countries in sub Saharan Africa are members of the World Trade Organisation (WTO). Members are required to use available resources, both judicial and administrative.⁵

6.1. An Analysis of the Judicial System in Sub Saharan Africa

Courts play an important role in enforcement of copyright and other intellectual property rights. The Judiciary has however been blamed for lack of or poor enforcement especially in cases involving infringement copyright in the music industry. Before analysing cases that have recently been determined by courts, it is important to understand the court structures in sub Saharan Africa.

(a) South Africa

South Africa has a three-tier court system; at the first level, they have the magistrate's courts, at the second level is the High Court and the final tier is the Supreme Court and the Constitutional Court. The magistrates' courts only handle criminal prosecutions of intellectual property cases.

⁴ Part 3 of the TRIPS Agreement.

⁵ See Article 41(5) TRIPS Agreement. This paragraph was included to address the concerns of the developing countries based on a proposal by the Indian delegation. However a recent consultative document by WIPO indicated that most member states favoured the establishment of IP courts acknowledging the complex nature of IP cases. This could be done through the special training of a few judges and prosecutors to handle IP cases as well as develop a resource and documentation centre with modern information technology. See Document WIPO/CME/3.

All other intellectual property cases, both civil and criminal are determined by the High Court and appeals lie with the Supreme Court.⁶

(b) Kenya

Kenya has a similar three-tier court structure. The courts of the first instance are the lower courts such as the magistrate's courts. The second tier is the High Court and the highest court is the Court of Appeal. To deal with the backlog of cases as well as provide fast and expeditious justice to the litigants, the Judiciary created the Commercial Courts, in 1990 to deal specifically with commercial cases.⁷ Both the Resident Magistrate's Court and High Courts have jurisdiction to determine criminal copyright infringement.⁸ The law does not say anything about magistrate's courts in dealing in civil cases in the field of copyright but in practice, the few copyright cases that have been filed in court have been filed in the High Court.⁹

(c) Nigeria

The court system in Nigeria reflects the diversity of cultures within the country. It has a Federal system of Government. The highest court in Nigeria is the Supreme Court within which final appeals from all other courts rest.¹⁰ The second tier consists of the Court of Appeal, the Federal and State High Courts, Customary Courts of Appeal and

⁶ It is important to note that patent cases are normally allocated to Judges who are knowledgeable in the area of patents due to their technical nature but all other cases such as copyright can be allocated to any judge.

⁷ Kenya has quite a number of specialised courts within the tier structure and these include the Children's court, the Commercial Courts, Family Courts, and the Industrial courts which were all established by the Judiciary to offer specialised services to the various sectors but interestingly have no specialised courts to deal with intellectual property.

⁸ Section 38(8) of the Copyright Act of Kenya.

⁹ *Wilson Irungu Wambugu v. AI Records (Kenya) Ltd* HCC 2230 of 2000, *Matthew Peevers v. Leo Slingerland & Media Productions Ltd* HCC 2112 of 1996, *Albert Kiarie v. John Nyaga & Others* HCC 2072 of 2000 These are examples of music copyright infringement cases that were filed in the High Court: HCC stands for High Court Case.

¹⁰ The Court of Appeal interestingly, retains a certain measure of original jurisdiction in selected cases. In Kenya and South Africa by contrast, the Court of Appeal and the Supreme Court respectively do not.

the Sharia Appeal Courts. The third tier consists of subordinate courts such as the Magistrates' courts, Area courts and customary courts.¹¹ Under the Copyright Act, the only court with the jurisdiction to try copyright cases is the Federal High Court.¹² Its position is reinforced by the Constitution of the Federal Republic of Nigeria.¹³

The courts within common law countries have similar structures but are not very different from the civil law countries like Senegal.

(d) Senegal

Magistrates' courts in Senegal determine copyright infringement cases.¹⁴ Like in other jurisdictions discussed above, there are no specialised courts that deal with copyright matters. This according to Mr. Aziz Dieng could be attributed to various factors such as limited expertise in copyright and related rights as well as resources.¹⁵ Furthermore, copyright cases that are brought to court do not justify the establishment of separate courts as they can be accommodated in existing structures. In Chapter 4, the author noted that in theory, an effective enforcement system is one that *inter alia* has a well-informed judicial system in matters of copyright.

Countries like China have established specialised Intellectual Property courts even though they are not obliged to do so. Developing countries on the other hand have to contend with budgetary constraints and lack of expertise especially in the area of copyright. Copyright cases have to be determined in the same courts as all other cases.

¹¹ John Asein, (2005) *Introduction to Nigerian Legal System*. Lagos, Ababa Press p.7.

¹² Section 38 Nigerian Copyright Act.

¹³ Section 251 (1) (f) of the Constitution of the Republic of Nigeria 1999.

¹⁴ Article 47 Copyright Act of Senegal 1973.

¹⁵ Interview with Mr. Aziz Dieng.

The main disadvantage, according to the author, of lack of specialised courts in countries like Kenya and Nigeria is that the cases are not given the due attention that they deserve. This is exacerbated by lack of specialised judges and lawyers in the field of copyright and related rights. The low level of IP cases that get to court in several developing countries may negate the need for specialised courts.

Developing countries may consider establishment of specialised Intellectual Property courts. Since there is a limited number of specialised judges and lawyers, training will be essential. Several countries already have special courts that specialise in various aspects of the law such as the family courts, the commercial courts, the Children's Courts to name a few. These courts are established within the existing judicial structures and have specific judges and magistrates assigned to them.

Enforcement of copyright by courts may be through the civil remedies such as injunctions, award of damages, and grant of Anton Piller Orders as will be discussed in the following paragraphs.

6.2. An Examination of the Role of Injunctions in Enforcement of Copyright

Injunctions are quite important as remedies for copyright infringement. An injunction is a court granted order, which stops the continuation of an infringing act or violation. Most injunctions on copyright cases are of either negative or prohibitory nature and are based on the principles of equity.¹⁶ The TRIPS Agreement makes provisions for member states to grant judicial authorities powers to order expeditious measures to prevent any infringement of Intellectual Property rights and to prevent access of the

¹⁶ Robert A. Gorman and Jane C Ginsburg, (1999). *Copyright Cases and Materials*. 5th Edition Virginia: Lexis Law Publishing. pp.729-731.

goods into regular channels of commerce including imported goods.¹⁷ These powers as envisaged by the TRIPS Agreement ensure a balance of interests of the rights holder and the user. Courts are reluctant to grant injunctions if the other remedies are deemed appropriate.¹⁸

Interim injunctions grant temporary relief to rights holder since they stop the infringer from continuing with the infringing act. They also prevent future acts that would amount to infringement. In practice, record companies are more likely to apply for injunctions. Quite a number of artistes in the music industry in several sub Saharan countries do not have resources to access courts. Furthermore, it is the record companies that are likely to suffer direct effects of unauthorised commercial use of music and they have to ensure that their investments are well protected. Infringers are normally well resourced and by the time the rights holder tries to get to them, they have either destroyed the evidence or moved it. Injunctions could either be temporary or permanent as will be discussed in the following paragraphs.

(a) Kenya

In Kenya, the principles underlying the grant of injunctions were laid out in the case of *Anielo Giella v. Cassman Brown*.¹⁹ First, the court has to establish that there is a matter to be determined. Second, the court must be satisfied that the applicant is likely to suffer damage if the injunction is not granted.²⁰

¹⁷ Article 50(1) of the TRIPS Agreement.

¹⁸ Richard Kuloba. (1987) *Principles of Injunctions*. Nairobi, Oxford University Press pp.124-134.

¹⁹ [1973] EA 358. This was an East African Court of Appeal case that was used to decide other copyright cases in Kenya, Uganda and Tanzania.

²⁰ *Jiwani v. going Out Magazine & Another* [2002] KLR 856.

The court must consider if the balance of convenience favours the grant of the injunction.²¹ The principles have since been applied to several copyright cases although the author did not find any decided cases on copyright in the music industry, the principles apply *mutatis mutandis*.²²

(b) South Africa

South Africa in this respect takes a slightly different approach based on the Roman/Dutch law and is known as an interim interdict. For one to obtain an interim interdict, according to Justice Harms, the following conditions must be fulfilled;²³ One, the applicant must establish a *prima facie* right. Secondly, the applicant must show the court that he has a well-grounded apprehension of irreparable harm if interim relief is not granted. Thirdly, the balance of convenience favours granting of an interim interdict. Finally the applicant has no other satisfactory remedy available. The final interdict can only be granted if the court is satisfied that there is a clear right, that an injury has actually been committed and a permanent injunction is the most suitable way to ensure that the rights holder is not further inconvenienced by further infringements.²⁴

These requirements are not mutually exclusive. The main difference between the two systems is the requirement of establishment of a *prima facie* right by the applicant. Both systems however serve the same purpose, which is to grant temporary relief as

²¹ The court will have to weigh the potential injustice to the defendant if the injunction is granted.

²² *Nevin Jiwani t/a Go Places. Publications & another v. Yellow Pages Publishing & Marketing Ltd* [2006] eKLR dealt with the principles of the grant of injunctions.

²³ Louis Harms. *The Role of the Judiciary in the Enforcement of Intellectual Property Rights: Intellectual Property Litigation under Common Law System with Special Emphasis on the Experience in South Africa*, *op cit.* p 486.

²⁴ The court may in some cases decide to award damages and this would essentially negate the need for granting a permanent injunction. In copyright cases, the defendant might sometimes take this to be a licence for them to continue with their infringing activities, in which case the permanent injunction would be more appropriate.

the rights holder awaits the determination of the case. Although the courts have been willing to grant interim injunctions or interdicts in the case of copyright infringement, they are cautious to ensure that frivolous and vexatious claims do not jeopardise rights of the defendant.²⁵

Injunctions are suitable for rights holders in the music industry for as long as the conditions outlined above are fulfilled. Preliminary injunctions may reduce the cost of litigation as the case may end with the grant of the injunction precluding the need to have a full court hearing to determine the case. However, obtaining these injunctions is not always easy due to several factors.

The high cost of litigation has contributed to the dearth of applications for injunctions.²⁶ The rights holders rarely seek injunctive relief as these take a long time to be granted and in most cases the damage caused is almost irreparable. In Kenya, rights holders in the music industry prefer to use alternative measures to recover their losses. This coupled by the fact that magistrates and judges have limited knowledge on copyright matters thus fail to treat copyright infringement cases with the importance that they deserve.

In chapter 4, one of the points suggested for effective enforcement is that the civil remedies should be simple and effective. The courts need to simplify these procedures so as to encourage the rights holders to pursue civil remedies. Injunctions may take inordinately long to be granted due to the long court processes discussed in the same chapter.

²⁵ Section 15(1) of the Nigerian Copyright Act, section 35(4) (a) of the Copyright Act of Kenya 2001 and section 24(1) of the Copyright Act of South Africa.

²⁶ See paragraph 4.2.5.

However, where the rights holder has reason to believe that there is an act of infringement taking place or is about to take place, they may resort to expeditious remedies such as Anton Piller orders.

6.3. A Critique of Anton Piller Orders in Enforcement of Copyright in sub Saharan Africa

The author examined the provisions of the TRIPS Agreement on expedient judicial procedures to the rights holder pending trial.²⁷ The Anton Piller order is one of the most effective methods to preserve evidence prior to litigation of a copyright case. This as was discussed earlier is necessary due to the nature of music copyright and the ability of the infringer to move or destroy the infringing items. In fact, the success of Anton Piller orders in common law jurisdictions might have inspired the inclusion of Article 50 of the TRIPS Agreement, which refers to the preservation of evidence in cases of copyright infringement.

It is an *ex parte* order that is only granted by courts if the infringer can prove the following: first, that there is a strong cause of action that the rights holder intends to pursue and the potential or actual damage is serious. This is important to deter frivolous claims with no merit. Secondly, the respondent has in his possession documents or items that would constitute vital evidence for the rights holder's case. Thirdly, there is a likelihood that the respondent will hide or destroy evidence by the time the matter comes to court.²⁸ The courts have to ensure that the procedure is not subject to abuse by rights holders.

²⁷ See paragraph 4.3.1.

²⁸ Ormod J. *Anton Piller K.G. v. Manufacturing Processes Ltd & Others* (1976) F.S.R 129, [1976] Ch. 55 See also *Shoba v. Officer Commanding Temporary Police Camps Wagndrift Dam* and another 1995 (4) SA 1 (AD).

The rights holder, as was determined in the case of *Anton Piller K.G v. Manufacturing Processes Ltd*, has to show that he has a *prima facie* case; that the damages he has suffered or is likely to suffer are irreparable if the order is not granted; and that the alleged infringer has in his possession incriminating documents or works that he might destroy prior to determination of the case. They allow the rights holder to access the defendant's premises, seize and detain any infringing works or contrivance used in the infringing activity.

The order also grants the rights holder rights to access and inspect documents in the custody of the defendant that are related to the infringement. This is to stop the alleged infringer from destroying evidence before determination of the case by the courts. These are *ex parte* orders that have to be obtained by a rights holder from court after he has provided courts with the *prima facie* evidence of the infringement. Advantages over the search order are numerous. First, it is efficient as the defendant is taken by surprise and will be prevented from dealing with infringing works until the determination of the case. In that way, the rights holder is assured that there shall be no further dealings in the works that have been seized. Second as the order is granted after the rights holder has shown that he has a strong *prima facie* case, the risk of liability on his or her part is lower. Third, the order must be carried out under supervision, either in the presence of a lawyer or a court appointed official. This will reduce the risk of tampering with evidence by the defendant, a common practice in common law jurisdictions.

The orders are a pre-emptive measure.²⁹ They will be examined in greater detail below.

(a) South Africa

South Africa has applied the Anton Piller Orders in several copyright cases.³⁰ Section 33 of the Constitution of the Republic of South Africa may justify its execution.³¹ The application granting search orders was initially done under common law but later incorporated into Counterfeit Goods Act of 1997.³² It is important to note that prior to the statutory provisions, the common law Anton Piller orders were applied by the courts.³³ Although common law orders and statutory orders are similar, there are some subtle differences especially as enacted by the Counterfeit Goods Act in South Africa.³⁴ It is notable that the statutory order restrains the person whom the order has been granted against from interfering with the materials seized. It also bars him from continuing with the offending acts. The statutory order, in the spirit of equity and fairness requires the applicant to furnish the respondent with security. This is more evident in the South African law and absent in the law in Kenya as will be discussed below.

²⁹ *Ibid.*

³⁰ *Huapt v. Brewers Marketing Intelligence (Pty) Ltd* [2006] SCA 39 (RSA), *Universal City Studios Inc v. Network Video (Pty) Ltd* (1986) (2), SA 734 (A), *Warner Bros Inc v. Electronics*, Cases No. 4607-15/86.

³¹ Act 200 of 1993.

³² Section 11 Counterfeit of Goods Act of South Africa See Dean, Owen *op cit* pp.1-78A-1 - 1-78B. The statutory version of an Anton Piller Order as set out in the Counterfeit of Goods Act is an additional to any other remedy available to the applicant.

³³ *Shoba v. Officer Commanding Temporary Police Camps Wagndrift Dam* and another 1995 (4) SA 1 (AD), this cases settled the long and tortuous history of the Anton Piller orders in South Africa.

³⁴ Section 11 Counterfeit of Goods Act of South Africa gives a detailed procedure for the application, conditions and grant of the Anton Piller orders.

(b) Kenya

In Kenya the Anton Piller orders, prior to 2003, were granted under the Civil Procedure rules and were used in the landmark case of *Microsoft v Microskills*.³⁵ The Copyright Act of 2001 specifically made the provision for the orders.³⁶ These have been applied in copyright cases but the rights holders have not taken advantage of the provisions in the music industry. The author attributes this to factors discussed in paragraph 4.2 such as the cost of civil proceedings and ignorance on the part of rights holders of the remedies available to them. In Nigeria, the courts have also applied the orders in copyright infringement cases.

(c) Nigeria

Anton Piller Orders are enshrined in the Copyright Act.³⁷ The application of the orders in practice has faced several obstacles in Nigeria. At one point, the Federal High Court held that the Anton Piller Order was inconsistent with the provisions of the Constitution.³⁸ This position was subsequently clarified by the Court of Appeal in the case of *Akuma Industries Ltd v Ayman Enterprises Ltd*³⁹ where the court, while acknowledging that courts should be wary of issuing Anton Piller Orders except in extreme cases, stated:

“Common sense and decency and the concept of civilised behaviour dictate that before the majesty of the court parties be at par at the hearing of a case. Indeed the *Anton Piller* although seemingly appearing as a monstrosity has become accepted within the vortex of our legal doctrines and jurisprudence although it appears destined to obviate the need to get the other side heard in

³⁵ *Microsoft Corporation v. Microskills Limited* Civil Case Number 323 of 1999.

³⁶ Section 37 Copyright Act of Kenya.

³⁷ Section 22 Nigerian Copyright Act.

³⁸ See the case of *Solignun Ltd v. Rogers Adetola* (1992) FHCLR 157. For further reading see Asein, J.

Introduction to Nigerian Legal System. supra, footnote 11.

³⁹ [1999] 13 N.W.L.R (Pt.633) 88-89.

an order that has far reaching effects that appears to breach section 33[1] of the Constitution. Where an application for Anton Piller Order is sought the court should see fit to refrain from an order that is wholesome and comprehensive in its tenor and application, the court being fully aware that it is merely relying on the affidavit of one party. Prudence demands that it ought to have been made with care and simplicity and caution not to destroy.”

The Nigerian scenario brings to fore several points. One, the orders are *ex parte* and should only be given in cases that satisfy the requirements set out above. Second, although the orders invade the privacy of another party, they are necessary to secure and preserve evidence. Third, the orders do not amount to self incrimination for the reasons stated above. Fourth, these are not search orders and simply compel the defendant to allow the applicant to enter his premises and detain any evidence that might be useful to determination of the case. Once the orders have been issued, the defendant has no choice but to allow the entry, as failure to do so would amount to contempt of court.⁴⁰ This might in a way explain the reluctance of courts to issue the orders in the first place. The civil law countries like Senegal as continue to be examined do not have specific provisions on Anton Piller Orders.

(c) Senegal

Senegal, being a civil law jurisdiction does not have provisions for Anton Piller orders under the Act. The courts only have the right to grant orders to the author of the work, his successor in title or the BSDA. The court will only grant the order for seizure if the applicant has given security in instances where copyright infringement has taken place or there is imminent danger of a copyright violation.⁴¹ The court in addition to

⁴⁰ *Anton Piller KG v Manufacturing Processes Ltd & Others.*

⁴¹ Article 47 Copyright Act of Senegal of 1973.

the above may order the suspension of the manufacture of infringing copyright works or public performance in progress, which constitutes copyright infringement.

The court may at the request of the rights holder call upon the police or military, customs or other law enforcement authorities to seize any copies unlawfully reproduced including the equipment that was used to make illegal copies.⁴² The Copyright Act does not mention whether the order may be granted *ex parte* but the principle of *siase-contrefaçon* as developed in the French courts might apply.⁴³ The order will only apply for a limited duration; it may cease to apply where the suit does not materialise or a *nolle prosequi* order is issued or even where the rights holder fails to file the suit in a competent court within thirty days.⁴⁴ Seizure under copyright law includes any proceeds of the infringing activity that are available at the time. Interestingly, the court may order that a certain sum from the seized proceeds be paid to the author as an allowance for maintenance.⁴⁵ When applied it would serve as a serious deterrent to infringers as their profits will be subject to seizure and would be a more expedient way to deal with infringers as it not only stops infringement but any benefits that the infringer would have enjoyed therein. This is a more effective way of dealing with copyright infringement. It is slightly different from that procedure found in the common law jurisdiction although the underlying principle is the same.

⁴² *Ibid.*

⁴³ Senegal is a Former French colony and the French laws influenced its laws and although it is a recent development in the French laws, it might be applicable to Senegal. However, it should be noted that the Copyright Act in this area is read together with the Code of Civil Procedure in Senegal.

⁴⁴ Article 49 Copyright Act of Senegal of 1973.

⁴⁵ Article 48 Copyright Act of Senegal of 1973.

Since Senegal is currently revising its law, it would be expedient for them to consider the inclusion of Anton Piller orders or a similar provision that will allow the courts to grant orders to obtain and preserve evidence.

The orders as mentioned earlier will only be effective if there is an element of surprise. If the defendant is aware of the orders, chances are that the goods or infringing articles will be removed or destroyed before the rights holder gets to the premises. Although the orders are available, copyright holders in the music industry have not made use of them. There are other forms of civil remedies that rights holders can obtain from courts to enforce their rights such as damages as examined below.

6.4. A Critical Examination of Damages, Account for Profits and Reasonable Royalties

The TRIPS Agreement requires member states to make provisions for payment of damages, which should adequately compensate the rights holder for the loss caused by infringement of his copyright. This would only apply to infringers who had knowledge or had reason to believe that the act was infringing on copyright.⁴⁶ TRIPS further incorporates the Anglo-American position that requires members to include payment of advocates' expenses incurred by the plaintiff as well as the recovery of profits and payment of pre established damages.⁴⁷ The former is a mandatory requirement while the latter is optional.⁴⁸

⁴⁶ Article 45(1) TRIPS Agreement.

⁴⁷ Article 45(2) See W. Herrington and G. Thompson, (2002). *Intellectual Property rights and the United States International trade laws*. Oceania Publications Inc. USA 2002, pp. 7-20.

⁴⁸ Gervais, D. *The TRIPS Agreement: Drafting History and Analysis*. op cit p. 207.

Provisions of the TRIPS Agreement lay down what is considered to be the minimum requirement. Most laws already had provisions for damages in the case of copyright infringement. To be effective, damages need not be punitive; they should adequately compensate the rights holder for losses incurred due to the infringing activity. There are however instances where damages may be deterrent if they are proportional to profits made by the infringer as in the case of Kenya below.

(a) Kenya

In Kenya, courts have been very conservative in their award for damages in copyright cases. For instance, in the case of *Alternative Media Limited v. Safaricom Limited*⁴⁹ that involved infringement of plaintiffs' artistic works, although the court found the defendant guilty, only general damages were awarded. This case has raised quite a number of issues with regard to the award of damages in copyright cases.

First was the issue of calculation of damages; the court requires guidelines and authorities to support the calculation of damages.⁵⁰ Second, the plaintiff has to prove that the profits made by the defendant are directly attributable to the utilisation of the infringing works. This can cause a problem in determination of an infringement case where the defendant carries out other commercial activities that are totally unrelated to the infringing activity. The highest damages awarded in copyright infringement in Kenya was KES 25 000 000⁵¹ in the software infringement case of *Microsoft Corporation v. Microskills Limited*.⁵²

⁴⁹ *Alternative Media v. Safaricom Limited* [2005] eKLR.

⁵⁰ In this case, the court rejected the plaintiff's claim that the damages be calculated based on the UK Publishers Association Code of Conduct as there was no supporting authority

⁵¹ The exchange rate in March 1999 was KES 76 to 1US\$.

⁵² Civil Case Number 323 of 1999.

The practice in Kenya is for courts to grant general damages where the defendant is found guilty and the mode of calculation of damages is not clear.⁵³ Relief of reasonable royalty in lieu of damages is granted in cases where the defendant is found guilty of copyright infringement. The issue of innocent infringement does not arise.⁵⁴ Seemingly, the law seems to leave the rights holder with no form of recourse even where infringement has been proved in court.⁵⁵ The rights holder in this case might opt to apply for a permanent injunction to stop the defendant from any further infringement but will not be compensated for infringement that has already occurred. However, a further reading of the Act reveals that the rights holder might have some form of relief.⁵⁶ The court, taking into account the flagrancy of a particular act of infringement and any benefit that might have accrued to the defendant through the infringement, may award such additional damages as it deems fit. The court must be satisfied that effective relief would otherwise not be available to the rights holder.

(b) South Africa

South Africa by contrast provides that the rights holder is not entitled to damages arising from infringement if the defendant can prove that he was not aware and had no idea that copyright subsisted in the work in question.⁵⁷ This is slightly different from the “guilty knowledge” required for secondary infringement of copyright.⁵⁸ The test in this case is an objective one as the defendant has to prove that he had no reasonable grounds of suspecting that copyright subsisted in the work.

⁵³ *Alternative Media v. Safaricom Limited* (2005) eKLR p.24 in this case, court declined to order either an inquiry to damages or an account of profits as the plaintiff failed to have the issue of liability determined by the court.

⁵⁴ Section 35 (4) (c).

⁵⁵ Section 35 (5) Copyright Act of Kenya.

⁵⁶ Section 35(6) Copyright Act of Kenya.

⁵⁷ Section 24 (2) Copyright Act of South Africa (as amended by the Copyright Amendment Act of 1992).

⁵⁸ See Chapter 3.

It is easier to discharge and has consequently been adopted as the standard of "knowledge" by South African Courts.⁵⁹

In 1992 the Copyright Act in South Africa did away with the remedy for account for profits and introduced the reasonable royalty as a form of compensation to the rights holder where his work has been misused. It took the place of conventional damages and is purely a creation of South African law, as no equivalent exists in common law or other jurisdictions.⁶⁰ This remedy is clear and distinct from the remedy for damages and is granted by the court in lieu of damages. It is a remedy to the rights holder against the innocent infringer.

Courts in South Africa reviewed earlier case law and set down the following principles for additional damages:⁶¹ First, additional damages may only be awarded by a court when the plaintiff already has a cause of action for relief and such relief cannot effectively be obtained by the plaintiff. Secondly, in determining whether it may be satisfied that effective relief could not otherwise be available to the plaintiff, the court will have regard not only to the flagrancy of the infringement and any benefit shown to have accrued to the defendant, but also all other relevant considerations. Thirdly, a consideration which is not relevant to the enquiry whether '*effective relief which would not otherwise be available to the plaintiff*' is the need to deter not only a particular defendant from infringing conduct but also other potential infringers. It is not justifiable to visit on the defendant the sins of other infringers.

⁵⁹ Dean, O.H., *Handbook on South African Copyright Law. op cit.* p. 1-74.

⁶⁰ Section 24(1A) Copyright Amendment Act 1992; this provision was further amended by s 52 of the Intellectual Property Laws Amendment Act of 1997. For further reading on civil remedies in South Africa see O. H. Dean. *Handbook on South African Copyright Law. op cit.* p. 1-75 and R. Kelbrick Vol. 30 Number 2 CILSA 1997 Vol. 30 pp.131-153.

⁶¹ *Metro Goldwin - Mayer Inc & Others v. Ackerman & Another* 558 JOC (SEC).

Finally, the fact that there is no yardstick by which additional damages are to be assessed on grounds of the flagrancy of infringement of copyright is no bar to the award of damages.

The court is required to exercise a value judgement in the matter.⁶² The law may be in place and the courts have clearly set out principles under which damages may be awarded but these have hardly been applied in practice.⁶³

(c) Nigeria

Compensatory damages must reflect the actual loss suffered by the rights holder.⁶⁴ In the case of *Yemitan v. Daily Times (Nigeria) Ltd*,⁶⁵ the court in addition to the other damages granted the plaintiff general damages. There is a notable absence of the provision for statutory damages in the countries under study. In addition to the above remedies, the courts where they find an infringement may order for delivery up or destruction of infringing goods.

6.5. The Effect of Court Orders: Delivery Up and Destruction

The courts may also order that the infringing goods and equipment used to make infringing copies be destroyed or disposed off outside channels of commerce without

⁶² O. H. Dean. *Handbook on South African Copyright Law .op cit.* p. 1-78.

⁶³ *Priority Records (Pty) Ltd v. Ban-Nab TV* 1988 (2) SA 281 (D) 292-294, *SA Music Rights Organisation Co (Pty) Ltd v. Trust Butchers* 1978 (1) SA 1052 (E) 1057-1058.

⁶⁴ France has similar provisions in their laws and the courts are known to award costs as was illustrated in the recent copyright case of *SACEM v AXL*. Unreported February 2005 Trib. Gde. Inst (*Pantoise*). In this case, the defendant was required to pay damages as well as costs for the infringements of music using the peer-to-peer file sharing system.

⁶⁵ [1980] F.H.C.L.R.

compensating the infringer.⁶⁶ The only exception to the destruction is if it is prohibited by the constitution of a particular party. However, courts prefer to order destruction of infringing goods in the presence of a court official to ensure that they do not find their way back into the market. The order for delivery up and destruction of infringing goods is available in most common law jurisdictions. The order is discretionary and will not be made in cases where its effects will be disproportionate.⁶⁷

This would go a long way in the fight against piracy as the infringer will not be able to trade in the infringing articles as they are confiscated and disposed off as the court may deem fit.

As discussed in paragraph 4.3.2 earlier, to be able to effectively enforce copyright, it is important to have both civil actions and criminal sanctions to deal with copyright infringers. In the following paragraphs, the author shall examine criminal sanctions as provided by laws in sub Saharan Africa.

6.6. Criminal Sanctions in sub Saharan Africa

Article 61 of the TRIPS Agreement states that:

“Members shall provide for criminal procedures and penalties to be applied at least in cases of wilful trademark counterfeiting or copyright piracy on a

⁶⁶ See Article 46 of the TRIPS Agreement. The only exception to the destruction is if it is prohibited by the constitution of a particular party. The disposal outside the channels of commerce will include the donation of infringing goods to charitable organisations such as in the case of books and goods infringing upon a trademark. However, the courts prefer to order the destruction of the infringing goods in the presence of a court official to ensure that they do not find their way back into the market.

⁶⁷ In the case of *Valco Vision SA v. Flexible Lamps Ltd* (1995) R.P.C 205, delivery up was not granted on the grounds that it was not in the interests of justice. For further reading see Garnet, Kevin *et al* op cit 1084-1086, John Asein. *Nigerian Copyright Law and Practice* op cit 176-179, Bainbridge *Intellectual Property Law* op cit p151, Dean O.H, *Handbook on South African Copyright Law*. op cit p.1-73

commercial scale. Remedies available shall include imprisonment and or monetary fines sufficient to provide a deterrent, consistently with the level of penalties applied for crimes of corresponding gravity. In appropriate cases, remedies available shall also include the seizure, forfeiture and destruction of infringing goods and any materials and implements the predominant use of which has been in the commission of the offence. Members may provide for criminal procedures and penalties to be applied in other cases of infringement of intellectual property rights, in particular where they are committed wilfully and on a commercial scale.”⁶⁸

Copyright Laws in Saharan Africa, as discussed in paragraph 3.3, make copyright infringement a criminal offence and provide penalties that could be in the form of fines, imprisonment or both. These sanctions are meant to be both punitive and deterrent.⁶⁹ The standard of assessment for compliance with the TRIPS agreement are that first of all, the remedies must be sufficient to provide a deterrent to copyright infringement and secondly, the level of penalties must be proportional to the gravity of infringement.

Criminal enforcement is not very common in most jurisdictions as litigants choose to pursue claims through civil and other administrative processes. This could be attributed to the society’s perception of copyright in general whereby copyright infringement is not seen to be a serious offence.⁷⁰ The few cases that have been determined by courts have failed to punish the offenders and stem off further infringements. They will be further examined. Another reason is that rights holders would like to be compensated for the loss occasioned by infringement of their rights

⁶⁸ Article 61.

⁶⁹ See paragraph 4.3.1.

⁷⁰ The apathy towards copyright can be illustrated in a particular case where the presiding Magistrates could not come to grips as to what a pirated copy of a musical work was. See Article by John Kariuki “Pirate’s Paradise”, The Daily Nation 10th February 2006.

and they have a better chance at recovering damages if the civil suit is determined in their favour. The Government retains the fines imposed by the courts. More convictions with fines would mean increased revenue for the Government that may be used to further improve the legal system. Criminal proceedings shift the burden of enforcement from the rights holder to the Government.

(a) Kenya

The promise of increased revenue may act as an incentive for more efficiency in determination of music copyright cases. The Copyright Act of Kenya makes a provision for courts to remit 50% of the fines collected from copyright infringement cases to the Kenya Copyright Board.⁷¹ Criminal sanctions are meant to be deterrent and punitive.⁷² The level of fines and the duration of sentences vary with each jurisdiction. Under the Kenyan copyright law criminal sanctions vary with the nature of infringement as defined within the Act. For instance, a person found to be either importing infringing sound recordings, distributing or offering for sale infringing copies, or has in his possession any contrivance used for making infringing sound recordings is liable to a fine not exceeding KES 400 000 or a prison term not exceeding 10 years or both.⁷³

If on the other hand, one is found selling or exposing for sale any infringing copy or is in possession otherwise than for his own personal use any infringing copy, then he shall be liable to a fine not exceeding KES 100 000 or a maximum of two years imprisonment.⁷⁴

⁷¹ Section 39(10) Copyright Act of Kenya.

⁷² See Chapter 4 above.

⁷³ Current Exchange Rate US\$1 to Kshs. 65.

⁷⁴ *Ibid.*

The Act further provides that any person who is found guilty is liable to a maximum penalty of KES 400 000 and a maximum imprisonment of 6 years or both in the case of a first offender.⁷⁵ In the case of subsequent offenders, the maximum fine is KES 800 000 or a prison term not exceeding 10 years or both.⁷⁶ A person causes musical works or sound recordings to be performed in public without the authorisation of the rights holder shall be guilty of an offence and is liable to a fine not exceeding KES 500 000⁷⁷ or a prison term not exceeding 4 years or both.⁷⁸

The provisions fall short of the Article 61 of the TRIPS Agreement in that although the law provided for maximum penalties, what will be eventually granted will be at the discretion of the court and this may not correspond with the gravity of the infringement. This will in turn have a bearing on the effectiveness of criminal penalties as a deterrent measure for copyright infringement in the music industry.⁷⁹

The provisions as contained in the Copyright Act may present several challenges to enforcement of copyright. First, it is quite obvious that there is an area of potential conflict between the provisions of section 38 (4) and (5) and section 38(6). The question for the presiding judge or magistrate is which section to apply as both refer to the same infringement but offer different penalties. So far, there have been no decided cases that have dealt with the above dilemma.

Secondly, rights holders have complained on several occasions that penalties are not stiff enough considering what infringers stand to make through commercial dealings

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*

⁷⁸ See Section 38 Copyright Act of Kenya.

⁷⁹ See Article 41 TRIPS Agreement.

in infringing works.⁸⁰ Rights holders advocated for a penalty system that was based on the volume of pirated works. This would be proportionate to the harm done by the infringer. Such a system is already in place in Uganda where fines are pegged on the value of each infringing copy of a work.

Thirdly, the fines and the penalties are purely at the discretion of the court. Since the Act was enacted, no copyright case in the music industry has been determined with the court awarding the maximum penalty and there have been no prison sentences either. It could be attributable to various factors such as the perceptions of copyright law as discussed in Chapter 4 as well as the courts attitude towards music and copyright.

In 2000, 13 criminal infringement cases were instituted in various courts in Nairobi and concluded in 2003 whereby all resulted in acquittals and dismissals.⁸¹ The verdict in these cases was enough to dissuade rights holders from pursuing criminal remedies for copyright infringement. The cases served to encourage unauthorised reproduction and sale of music as the offenders knew that they were unlikely to get convicted by courts. So far there have been no convictions in the few cases that have been prosecuted in court. This also discourages the police and other enforcement agencies especially prosecutors from pursuing cases that involve music copyright infringement.

Where the court is satisfied that works are infringing copies or equipment is used for making infringing copies, they order the accused person to deliver them to the owner

⁸⁰ Memorandum presented to the Copyright Office at the time of publishing the Copyright Bill in 2003 by Iseme, Kamau and Maema Advocates on behalf of the Software industry in March 2001 (on file with the author).

⁸¹ Marisella Ouma. (2004). Copyright Act 2001 of Kenya; A New Era for Copyright Protection in Kenya. *Copyright Bulletin* UNESCO Publication.

of the copyright or the court so that they may be disposed off. This is regardless of whether or not the accused person is convicted by the court. However, this has not been the case in several copyright cases. For instance in the case of *R v Angelina Mbari*⁸², the presiding Magistrate held that;

“Hence even if the exhibits produced in court are infringing copies or pirated video cassettes, the charge does not support them. The offence is not proved and the accused person is acquitted...Inform the accused person through her lawyers to collect the exhibits belonging to her. Others should be released tothe complainant in this case.”⁸³

The complainant in this case did not bother to appeal against the decision. The ruling in this case and similar rulings in subsequent cases provided a green light for those dealing in infringing works to continue doing so. This made enforcement efforts more difficult as the alleged infringers would use the court ruling to their advantage.

(b) Nigeria

The Criminal Code previously governed copyright infringement in Nigeria. Sections 491-493⁸⁴ of the current Copyright Act provides for criminal infringement and penalties.⁸⁵ The fine is pegged on the number of infringing copies and is considered to be more effective as it is proportional to the level of infringement. The advantage of having the fine pegged on the volume of infringing works is that although the court

⁸² CF2431 of 2000 (Unreported).

⁸³ *Ibid.* It should be noted that this case was decided before the Copyright Act No. 12 of 2001 came into force. The provisions of Section 16 of the Copyright Act Chapter 130 of the Laws of Kenya were similar to the current provisions.

⁸⁴ Chapter 42, Laws of the Federation of Nigeria and Lagos 1958 See John Asein *Nigerian Copyright Law and Practice*, *op cit.* pp.144-135.

⁸⁵ Under the said Act, any person who is found to be importing, offering for sale, making or causing to be made any infringing work shall be liable to a fine not exceeding 1 000 Naira for every copy found to be in contravention of the copyright Act or an maximum prison term of five years or both. Section 18 of the Copyright Act of Nigeria.

still has the discretion to decide what fine will be attached to each unit, the total is likely to be substantial. This was based on the Criminal Procedure Code.⁸⁶

The burden is on the prosecution to prove that the infringer knew that he was dealing in infringing copies contrary to provisions of the copyright Act. In the case of *Federal Republic of Nigeria v. Asika*, the accused was acquitted as the prosecution failed to prove that the accused had knowledge that the books he was selling were pirated.⁸⁷ Since the burden is on the prosecution to prove the case beyond reasonable doubt, the infringer can always rely on this defence and hope that the prosecution will fail to prove the case. Once the case has been determined, the court has the power to order the destruction of infringing copies, (or copies that appear to be infringing copies) the delivery up to the rights holder or disposed off by any means that the court deems fit regardless of the outcome of the case.⁸⁸ This is a useful provision especially where cases might be dismissed for technical reasons. It ensures that even if the infringer is not convicted but the court is convinced that the copies are infringing, he will not have access to the infringing items.

(c) South Africa

Criminal offences in the field of copyright and related rights in South Africa are dealt with under both the Copyright Act and the Counterfeit Goods Act.⁸⁹

⁸⁶ Section 491 Chapter 42 of the Laws of the Federation of Nigeria and Lagos.

⁸⁷ *Federal Republic of Nigeria v. Asika* Unreported Case No. FHC/K/2CR/92.

⁸⁸ Section 18(4) Copyright Act of Nigeria.

⁸⁹ South Africa Copyright Act of 1978 as amended and Counterfeit Goods Act No. 37 of 1997. Under the copyright Act, any person who makes for sale or hire, sells or lets for hire by way of trade offers, imports into the country other than for private use or distributes copyright protected works for commercial purposes without the consent of the right holder is guilty of an offence. Acts of secondary infringement such as making or having in possession contrivances for making infringing copies, causing musical works to be performed without the authority of the right holder, as well as broadcasting infringing works constitute criminal offences.

The penalties prescribed by the Act are based on whether the accused is a first or subsequent offender.

Increasing trade in counterfeit and pirated goods in the South African market prompted the South African Government to pass the Counterfeit Goods Act. One of the main features of the Act is that it criminalizes counterfeiting and pirating of intellectual property namely within the spheres of copyright and trademarks. The Act makes it an offence to deal with counterfeit or pirated goods.⁹⁰ A person dealing with such goods will be guilty of the offence if they had "guilty knowledge." The person would thus be guilty if either they knew or must have had reason to suspect that the goods in question were counterfeit or pirate goods, or he must have failed to take reasonable steps to avoid performing or being engaged in one of the acts restricted by the Counterfeit Goods Act.⁹¹ Another feature is the extension of the scope of Section 27(1) of the Copyright Act to include the possession of infringing copies as a criminal offence.

According to the International Intellectual Property Alliance, in 2000, the law enforcement agencies in South Africa carried out 177 raids on unauthorised commercial use. Only 18 cases were prosecuted and 13 of the prosecuted sentences resulted in fines of less than \$ 1 000. In a country where the law pegs the fine to the number of infringing articles, the fine was not close to the maximum stipulated by the law as discussed above. There were no prison sentences. 4 cases were pending and

⁹⁰ Section 2(1) Counterfeit of Goods Act The following are considered counterfeit goods under the Act, pirate records, compact discs, pirate video tapes, pirate computer programs and computer games, pirate copies of books and goods bearing infringing trade marks.

⁹¹ Section 2(2) Counterfeit Goods Act.

there was one acquittal.⁹² The courts seem to be reluctant to give the maximum sentence or fines where the infringers are found guilty. The table below gives an indication of criminal infringement cases related to music in South Africa.

Table 6 Criminal Enforcement Statistics in South Africa⁹³

<hr/>		
Actions taken in Cases of Sound recording	1999	2000
Number of raids conducted	231	177
Cases commenced	17	18
Defendants convicted	10	13
Acquittals or Dismissals	3	1
Pending cases	4	4
Convictions resulting in jail terms	0	0
Suspended prison terms	2	0
Convictions resulting in Criminal fines	6	13
Fines of up to \$ 1000	1	13
Fines of above \$ 1000	0	0
Total fines levied	US\$ 250	US\$1 200

The table above shows that there are relatively few criminal cases that actually get to the courts. Where the pirates are found guilty, there is a low risk of getting a custodial sentence and the fines are negligible. Given the amount of profits a pirate makes from his activities, payment of the fines will not be much of a problem and this in a way renders the enforcement system ineffective. In 2000, the average fine came to about US \$92 while in 1999 it was only about US\$ 41.

(d) Senegal

Criminalisation of copyright infringement in Senegal is through Article 46 of the Copyright Act and the Penal Code. The importation, exportation, manufacture or exploitation of a work reproduced in violation of the Copyright Act is a criminal

⁹² See IIPA Special 2003 Special 301 Report. The author was not able to get more recent figures from South Africa.

⁹³ *Ibid.*

offence within the meaning of Article 397 of the Penal Code.⁹⁴ Despite enhanced fines and prison sentences, the level of unauthorised commercial use in the music industry continues to increase.⁹⁵

6.7. Challenges to Judicial Enforcement on Copyright in the Music Industry

From the above studies it is notable that the problem of enforcement has more to do with the implementation of law than substance. Fines and custodial sentences may be increased further but this will not have the desired effect if there are no convictions and harsh sentences meted out by the courts. The number of criminal cases instituted by courts is quite low. Malawi provides an insight of the criminal enforcement of copyright, which would be representative of several developing countries in Africa. The courts get to handle at least 4 cases of criminal copyright infringement in one year. Of these, three have resulted in criminal convictions and one acquittal. The highest penalty during that period was an equivalent of US\$ 10 or six months imprisonment. The penalty does not even cover the price of one legitimate CD. This hardly serves the punitive and deterrent effect that criminal penalties are meant to have.⁹⁶ Just as in South Africa and Kenya, the cost of being apprehended and punished is negligible compared to the profits made from unauthorised commercial use of music.⁹⁷

⁹⁴ Article 46 Copyright Act of Senegal. Senegal does not draw a distinction between the primary and secondary infringement and any unauthorised dealing in copyright protected works is punishable under criminal law. This is different from the provisions of the Kenyan, Nigerian and South African laws, which only criminalize what would be termed as secondary infringement of copyright. These laws do not for instance, criminalise the reproduction of infringing copies but make it a criminal offence to deal in infringing copies.

⁹⁵ See paragraph 2.5.

⁹⁶ Communication with Mr. Rosario Kamanga, of COSOMA, May 2006.

⁹⁷ The Author has used Malawi to try and further illustrate the problem with the criminal remedies and how these contribute to ineffective enforcement of copyright. This is due to the availability of statistics from the Copyright Office in Malawi. The author was not able to obtain the relevant statistics from Nigeria and Senegal.

The Judiciary has a role to play in the validation of Intellectual Property rights. If it is not efficient in the aforesaid duty, then it would have failed the rights holders.⁹⁸ There is no doubt that the Judiciary plays an important role in enforcement of copyright and other Intellectual Property rights.

There are few reported cases on infringement especially those related to music. Enforcement by the Judiciary is sub optimal due to various factors and these are as follows:

(a) Length of time taken to determine cases

Cases take an inordinately long time to be determined. The current structure and capacity of the judicial systems is partly to blame for the delays. This situation is connected to the prevailing economic situations in most developing countries as discussed before in paragraph 4.2.5. For a long time, the determination of cases by the courts was a long and tiring process. This is a problem that affects all cases. South Africa has considered the possibility of establishing specialised courts to deal with Intellectual Property cases.⁹⁹

The current structure and capacity of courts within Kenya, South Africa, Nigeria and Senegal, has an effect on the determination of copyright infringement cases. There are no specialised courts to handle these cases or specialised judicial officers. The litigants have to contend with the existing processes.

⁹⁸ Robert Sherwood. (1999). "The Economic Importance Of Judges" Paper presented at the International Judge's Conference on IP Law, Washington DC, October 1999 as quoted by Louis Harms pp. 483-492.

⁹⁹ *Ibid.*

Civil cases can take about three years to be determined in Kenya.¹⁰⁰ Criminal cases usually take less time to be determined and could take few months to be concluded. Time is of essence in copyright infringement cases especially music as the shelf life is limited due to changing styles and preferences. A delay in the trial could translate into irreparable damages, as the infringer will already have capitalised on the sales especially for the chart toppers.

At the moment, most litigants in sub Saharan Africa have to contend with the slow court process. Even where specialised courts were to be established, the problem of lack of specialised Judges, prosecutors and lawyers would have to be addressed as there are very few in the legal profession who have specialised in Intellectual Property especially copyright law. Copyright cases in some countries have landed in the subordinate courts regardless of their pecuniary jurisdiction. The cases were treated in the same way as petty offences and offenders dismissed with minor fines or freed.

There are instances where orders granted by courts are difficult to enforce and the rights holder finds himself worse off than at the beginning of court proceedings. This discouraged the litigants from pursuing copyright infringement cases.

It also affects the grant of preliminary injunctions, which in some cases were granted too late to be of any use to the parties seeking them. The purpose of preliminary injunctions as well as interdicts is to prevent infringements, stop commercial distribution of infringing goods and to preserve any evidence. Delays in granting such injunctions render them ineffective whereas the TRIPS Agreement provides that enforcement procedures should be fair and equitable.

¹⁰⁰ In 2000, 13 cases involving music copyright infringement were filed in Kenya and were only concluded in 2003.

There is a need to address the issue of delays in court procedures. This may include the establishment of specialised courts.¹⁰¹ The author however notes that under Article 41(1) of the TRIPS Agreement as was discussed in paragraph 4.3.1.3, Member States are not obliged to provide separate judicial systems for enforcement of Intellectual Property rights.

The author contends that establishment of specialised courts for Intellectual Property infringement cases could help in alleviating this problem. Since there is a limited number of specialised judges and lawyers, training will be essential. The establishment of these courts need not create a burden on the Government. Several countries already have special courts that specialise in various aspects of the law such as the family courts, the commercial courts, the Children's Courts to name a few. These courts are established within the existing judicial structures and have specific judges and magistrates assigned to them.

(b) Lack of or limited Knowledge on Copyright and Enforcement

Lack of knowledge on copyright law by lawyers, judges and rights holders has a negative effect on copyright cases. The infringers continue with the infringement with the backing of the judicial decisions in their favour. This was well illustrated in case *R v. Wilson Irungu Wambugu*.¹⁰² In this case the presiding magistrate failed to address copyright matters. One of the issues raised was the nature of the infringing copies. The court did not accept evidence adduced by the rights holders to prove that they were the authorised licensees.

¹⁰¹ A. Subramanian and J. Withal. (2000) 'Can TRIPS Serve as an Enforcement Device for Developing Countries in the WTO? Journal of International Economic Law, vol.3, no. 3, pp. 403-16.

¹⁰² Unreported Criminal Case No. 2433 Of 2000 City Court (Kenya).

However, the magistrate accepted the testimony of the accused person that they were importing the music legally as they paid duty and bought the music from legitimate distributors outside the country. What the court did not realise is that the payment of duty and the licences from the Ministry of Information had nothing to do with copyright. Customs Officers were only interested in the collection of revenues while the information ministry is concerned with the vetting of the contents therein.

Importation of copyright protected works is the exclusive right of the rights holder, his licensees or assignees. A third party cannot therefore buy music from outside the country and subsequently sell it in Kenya without the authority of the rights holder. Section 28 (1) (c) of the Copyright Act does not allow parallel importation of the copyright protected works: Thus although the defendant did not have any proof of the above, the goods were none the less released to him. The court had failed to address one of the basic principles in copyright law, namely ownership. It also failed to properly address the presumption of ownership. Thus, it was up to the defendant to prove that the complainant was not the rights holder.

The attitude of the judicial authorities is very discouraging to the rights holders. Julie Gill of AI records contends that such cases serve to encourage infringers to continue with their activities and use the court ruling as an approval. This hampers the enforcement efforts since every time AI records makes a complaint to the police, the infringer will subsequently be released on the strength of the court rulings.¹⁰³ This also discourages the rights holders from pursuing criminal charges against the infringers as they stand to lose on technical grounds.

¹⁰³ Interview with Julie Gill of AI Records in July 2005, Nairobi.

The attitude of the court may be explained by the lack of seriousness on copyright infringement cases as they are yet to grasp the concept of copyright infringement and the gravity of the offence. Lack of knowledge on copyright and related rights by the judicial officers as well as the lawyers reduces the efficacy of the courts and this is reflected in some of the rulings made by the courts which do not address the main copyright issues raised by the litigants.¹⁰⁴ With the backing of these court decisions, the infringers embark on further infringement with renewed vigour.¹⁰⁵

(c) Difficulty in obtaining evidence

Infringers are highly mobile and have the ability to dismantle their operations and move or hide the evidence when they are aware of any impending raids. Kenya, South Africa and Nigeria have provisions for Anton Piller Orders as was discussed in Paragraph 6.3 but courts have been very conservative in issuing the orders. However, where the orders have been granted, they have been successful in preserving evidence.

In Senegal, although there are no provisions for the equivalent of Anton Piller Orders, courts may grant orders for seizure where the applicant has given security.¹⁰⁶ This is likely to act as a deterrent to rights holders who may not be able to provide for security required. Furthermore, due to various undesirable practices, the infringer may get to know of the impending raid and move the infringing material eliminating the element of surprise, which is essential in securing the orders.

¹⁰⁴ Relevant case law.

¹⁰⁵ Landau Michael and Bierdman Donald E, (1999). The case for a specialised copyright court: Eliminating the jurisdictional advantage. *Hastings Communication & Entertainment* LJ 717. See the recent case of *Alternative Media v Safaricom Ltd* [2005] eKLR available at: <http://kenyalawreports.or.ke>.

¹⁰⁶ See paragraph 6.3.

(d) Penalties set out by the laws are neither punitive nor deterrent

The laws set the maximum sentence and the fines given by the court are subjective and at the court's discretion. In many cases, the infringers can pay the fines, continue with the infringing activities or fold up, set up another company and continue trading.¹⁰⁷ There are very few convictions in copyright infringement cases and where convictions are obtained rarely are custodial sentences meted out and the fines are negligible. In South Africa, as the author discussed in Paragraph 6.5, out of the 18 cases that were prosecuted in 2000, 13 convictions were obtained with no custodial sentences and the fines not exceeding an equivalent of US\$ 1 000. Criminal sanctions do not serve their purpose. Laws in sub Saharan Africa do not provide sufficient penalties or sanctions to ensure conformity, which as was discussed in paragraph 4.5 is essential for effective enforcement. The author notes that there were no criminal convictions that resulted in custodial sentences as illustrated by South Africa.

(e) Prohibitive cost of litigation

Most of the artists can barely make a living from music and the high costs of litigation stop them from pursuing civil claims and where possible settle out of court. Furthermore, the award of the litigation costs is within the court's discretion. The costs are also determined by the nature of the subject matter of the case. Costs such as those of the expert witnesses have to be factored in and the cases take quite a while to be determined.¹⁰⁸

¹⁰⁷ In Kenya, the highest damages awarded by courts in a copyright infringement case was KES 25 million (about US\$ 320 000). This case involved infringement of computer software. The author was unable to find any music copyright cases where damages were awarded. Unfortunately, the Defendant filed for bankruptcy and the company wound up soon after the hearing and plaintiff did not receive the money in damages. See *Microsoft v Microskills*.

¹⁰⁸ Prior to the establishment of the Commercial Courts in Nairobi, Kenya, it was common for a civil case to take up to six years to be determined. In some cases the case could drag on for more than ten years. The constant adjournments and hearings are time consuming not to mention also quite expensive in terms of travel to court and lost man hours.

The cost of litigation is expensive and several artists would rather not go through the whole process especially when they are uncertain about the outcome of the case.

The alternative is to have criminal proceedings instituted against the alleged infringer. If the case has any reasonable doubt on the evidence and facts availed before the courts, then the case is likely to be dismissed. The high rate of dismissals mainly on technical grounds has discouraged rights holders from filing complaints with police and pursuing criminal cases.

(f) High levels of corruption

High levels of corruption among judicial officers and other law enforcement agencies is a challenge to copyright enforcement. In Kenya for instance, corruption in the judiciary was phenomenal.¹⁰⁹ This resulted in several judges being suspended and magistrates sacked.

(g) Rebuttable presumption of copyright ownership

In several cases, alleged infringers have raised the issue in court and the rights holders have had to provide proof of ownership and subsistence of copyright. This shifts the burden of proof to the rights holder failure, whereby the alleged infringer is likely to walk away without paying for infringement.

¹⁰⁹ In 1998, the Kenyan Government appointed a Task Force chaired by Court of Appeal Judge Justice Richard Otieno Kwach to look into the performance allegations of corruption and operational problems of the judiciary among other things. The Kwach Report was submitted to the Government and debated upon. In June 2003 Justice Aaron Ringera's Report made similar findings of massive corruption. A Commonwealth report on the same revealed high levels of corruption within the Kenyan Judiciary. In 2003, the Ringera Report came up with similar findings and it is through this report that over 23 Judges and 73 Magistrates were retired in public interest. There were those who opted to face the tribunal established to investigate their conduct.

6.8. Conclusion

The current structure and capacity of the courts in Kenya, Senegal, Nigeria and South Africa as discussed above has an effect on the determination of music copyright infringement cases. There are no specialised courts to handle these cases or specialised judicial officers. The litigants have to contend with the existing processes. Time is of essence in copyright infringement cases especially music as the shelf life is limited due to changing styles and preferences. A delay in the trial could translate into irreparable damages, as the infringer will already have capitalised on the sales especially for the chart toppers.

In light of the above, the idea of specialised Intellectual Property courts would seem quite attractive especially to rights holders who have to contend with the long delays and the subsequent losses. However, it is important to note that availability of specialised judges and lawyers has to be taken into consideration as well as the financial burden that is likely to be visited upon the Government. Furthermore, the low number of copyright cases and Intellectual cases, as a whole might not justify the establishment of separate courts.

Fair and equitable procedures are desirable in any judicial system. The TRIPS Agreement requires WTO member states to make fair and equitable civil judicial procedures available to rights holders in relation to enforcement of any Intellectual Property right.¹¹⁰

¹¹⁰ Article 42 TRIPS Agreement.

Enforcement by courts as demonstrated in the preceding paragraphs is influenced by:

- (a) The existing legal regime.
- (b) The attitude of the law enforcement agencies towards music copyright.
- (c) The level of knowledge on music and copyright.
- (d) The prevailing economic situation in a given country. The smaller the economy the more restricted allocation of funds to enforcement of copyright and Intellectual Property law in general.
- (e) The political situation.

The author proposes the following in addition to the proposals in Chapter 5:

The first proposal involves the constitution of specialised courts that would deal with intellectual property infringement cases. Since there is a limited number of specialised judges and lawyers, training will be essential. These courts are established within the existing judicial structures and have specific judges and magistrates assigned to them.¹¹¹

Second proposal is the implementation of existing legal provisions by law enforcement agencies. The penalties and custodial sentences serve as a deterrent if people are actually jailed and or fined accordingly. Damages awarded in civil courts should be pegged on the number of infringing acts so as to adequately compensate the rights holder. The policy should include provisions for mechanisms for enforcement. There should be a link between the law and the enforcers. This will also include border measures and co-operation between customs, police and rights holders.¹¹²

¹¹¹ See Paragraph 5.6.8 above.

¹¹² See Paragraph 5.6.8 above.

CHAPTER 7. TOWARDS AN OPTIMAL LEVEL OF MUSIC COPYRIGHT ENFORCEMENT IN SUB SAHARAN AFRICA

7.1. Summary

This chapter gives a summary of the thesis and provides some policy guidelines based on the conclusions from the research undertaken.

The thesis begins on the premise that enactment of copyright law without corresponding institutional and administrative framework of enforcement is of limited value to those it seeks to protect. Using an analytical study of laws and enforcement mechanisms of four sub Saharan countries, the thesis addresses three core issues:

- (a) Why is music copyright enforcement sub optimal in sub Saharan Africa?
- (b) Why has the legal regime failed to ensure effective enforcement of copyright in the music industry and?
- (c) What constitutes effective enforcement of copyright in the music industry?

The thesis, in light of the above issues, critically analyses existing institutional framework (legal and administrative) in the context of the political, economic as well as social dynamics within four jurisdictions. The countries have modern and updated copyright laws but there are limited guidelines on implementation for provisions on enforcement.

Chapter 2 gives a background of the music industry in sub Saharan Africa as well as the challenges. The chapter explores the perceptions of the society in relation to ownership of music from the pre-colonial times to present day. It also examines social, economic, political and technological factors that have contributed to the growth and development of the music industry. The rising levels of unauthorised commercial use are attributed to lack of or limited enforcement of existing copyright law. This chapter seeks to address the question as to why copyright enforcement in sub Saharan Africa is sub optimal.

Copyright law plays an important role in the enforcement of rights within the music industry. In Chapter 3, copyright laws in Africa are closely examined. The chapter contextualises copyright in the music industry in sub Saharan Africa in context and highlights the role of the international norms in shaping the domestic legal regime. It is clear from the chapter that the copyright regime is and continues to be influenced by the international norms although to a small extent, the prevailing conditions within the local copyright industry have played a role as illustrated in the case of Nigeria. Copyrights laws in sub Saharan Africa been amended and revised several times to incorporate international trends in copyright as well as address domestic needs raised by stakeholders within the music industry. Laws are in place and what is lacking is implementation.

The Chapter evaluates the first and the second question the author sought to address in relation to the hypothesis. What constitutes effective enforcement of music copyright is central to the research.

Chapter 4 gives an in-depth analysis of what enforcement entails. To better understand this concept, the thesis examined and discussed various factors that influence enforcement mechanisms. The political will seems to be lacking on the part of the Government as is evidenced by lack of a clear policy on enforcement of copyright and other intellectual property rights. It is not enough for the Government to pass laws, there have to be corresponding administrative systems to enforce the laws. The economic conditions as well as the social cultural values determine the level of adherence to the existing laws.

Chapter 4 further critically examined the theoretical framework of enforcement and came up with proposals as to what would constitute the optimal level of enforcement. Effective enforcement involves a constant review of current procedures. The findings in chapter 4 formed the basis of the analytical study of the institutional framework in Kenya, Nigeria, Senegal and South Africa.

In Chapter 5, an in-depth analysis of the institutional structures in sub Saharan Africa provides an informed study on the existing enforcement mechanisms. The 4 countries have similar legal provisions and the challenges in enforcing these laws are not different. The study illustrates the deficiencies in the various legal systems. It explores the roles of the various enforcement agencies as well as the users and rights holders. There is no doubt that the Judiciary plays an important role in enforcement of music copyright.

Chapter 6 examines the judicial system in relation to enforcement of copyright in the music. The civil remedies and criminal sanctions both have their advantages as well

as disadvantages. There are limitations based on political, social and economic aspects that deter effective enforcement copyright in the music industry by courts as discussed in Chapter 4. From examination of judicial enforcement in sub Saharan Africa, one of the notable features is the number of cases that get to the courts are negligible especially in light of increased levels of piracy in the music industry. There are a few reported cases and these are attributed to factors discussed in Chapter 6. An effective administrative mechanism backed by the necessary political will is essential to the success in the fight against the unauthorised use of music.

By examining deficiencies in existing structures, the author is able to come up with proposals for guidelines on enforcement. The proposals as outlined in Chapter 5 and Chapter 6 address the shortcomings as well as the strengths of the four systems and how to achieve the desired level of compliance with music copyright law.

7.2 Conclusion

An effective enforcement system is one that ensures a high level of conformity to the law and deterrence at the minimal cost to the enforcement agencies and the right holders. It involves constant review of procedures to deal with infringement. An increase in local creative industries such as music is likely to provide an incentive for more effective enforcement of copyright and related rights. The following are proposals for optimal enforcement of copyright in the music industry in Africa. To be able to achieve the desired level of enforcement, the thesis, through a critical analysis of the legal and institutional framework within the sub Saharan Africa was able to

determine what constitutes a good enforcement policy, and how to achieve an efficient enforcement system.

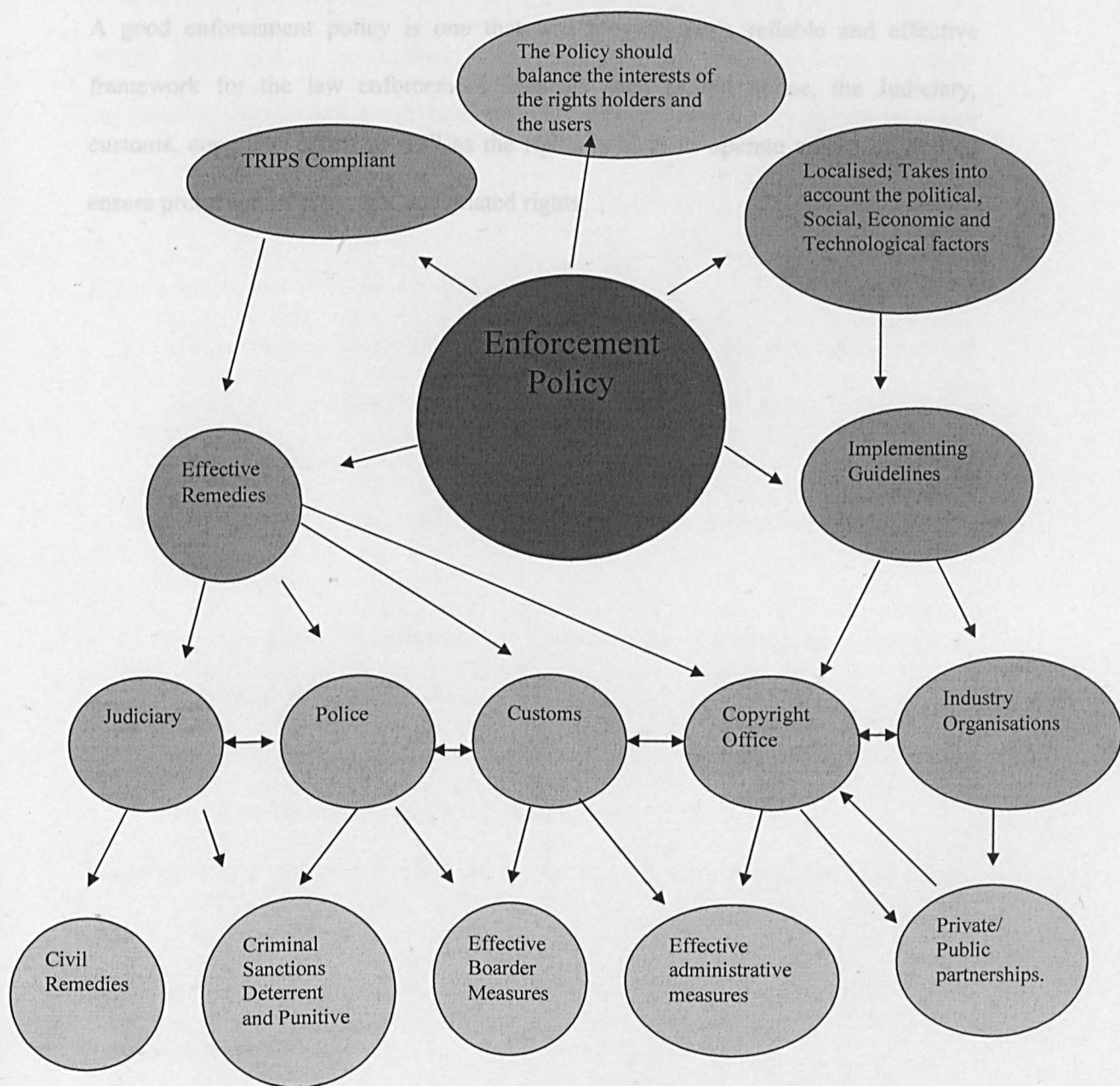
In reconstructing the institutional framework on copyright enforcement one needs to address issues of how existing institutions came into being and whether they serve the purpose for which they were created. In the case of the music industry, both public and private institutions have to be considered. The ideal institutional structure is one that is "home-grown." However, the reality is that copyright is governed by international norms and all countries that are members of the WTO have to provide abide by the minimum standards set out by TRIPS. The TRIPS Agreement may have its shortcomings and provisions for enforcement are perceived to have a strong influence from the law in the United States. Countries in Africa may be reluctant to implement the provisions in their laws but unless the Agreement is amended, they have an obligation to legislate minimum standards.

Enforceable laws, efficient institutional structures and enforcement mechanisms, strong cultural policies as well as positive perceptions of copyright and music are necessary for effective enforcement of copyright law. These, coupled with favourable political and economic climate as well as access to technology, provide the basis for effective enforcement of copyright law.

Appendix 1. Enforcement Policy

The diagram below gives a summary of what a good enforcement policy entails.

Good Enforcement Policy



The enforcement policy should take into account the minimum provisions required by the TRIPS Agreement. It should also take into account the social, political and economic dynamics of each country. The enforcement should be simple but expeditious and should constitute both effective and deterrent remedies and sanctions. A good enforcement policy is one that will provide for a reliable and effective framework for the law enforcement agencies such as the police, the Judiciary, customs, copyright office as well as the rights holders to operate within as well as ensure protection of copyright and related rights.

Appendix 2. Policy Guidelines

The main purpose of these guidelines is to facilitate the efficient enforcement of copyright and related rights in sub Saharan Africa. The guidelines are set out below.

In desiring to promote effective as well as adequate protection of copyright and related rights and to ensure that measures and procedures to enforce copyright encourage creativity and foster trade and development, the policy should take into account the following:

1. The need for new rules and disciplines concerning:

- a) The provision of effective and appropriate means for the enforcement of copyright and related rights taking into account the social, political and economic conditions within the country;
- b) The provision of fast and expeditious procedures to enforce copyright and related rights;
- c) The provision of measures to prevent the unauthorised commercial exploitation of copyright works;
- d) The provision of adequate standards and principals concerning availability, scope and use of copyright and related rights;

2. That copyright and related rights are private rights but are best enforced as public goods.

3. The underlying public policy objectives of each country for the protection of copyright and related rights.

4. That without effective means of enforcing copyright and related rights, creativity is discouraged and investment reduced. It is imperative that the substantive copyright

law within countries in sub Saharan Africa applied effectively. This is important for the growth and development of the creative industries.

5. That the TRIPS Agreement contains the minimum standards for the enforcement of copyright in hand with related rights and the policy should be based on the TRIPS Agreement and should not interfere with the various countries' international obligations including those under the TRIPS Agreement; The policy should however take into consideration the social-political and economic development of the countries in sub Saharan Africa.

6. That each country has national laws in place and the policy should not prejudice their obligations under the national laws especially if they are compliant with the existing international laws.

7. The fact that copyright does not require formal registration, it would thus be appropriate to adopt the rule laid down in Article 15 of the Berne Convention, which establishes the presumption whereby the author is regarded as such if his name appears on the work. A similar presumption should be applied to owners of related rights since it is often the holder of the related right who will seek to defend their rights.

8. That the rights holders, their assignees or licensees should have the right to take action against the infringer.

9. There should be effective means of presenting, obtaining and preserving evidence where available. These procedures should take into account the rights of the defence and provide the necessary guarantees including the protection of confidential information.

10. There should be a provision for the right to information that will enable the law enforcement agencies to obtain information on the origin of the infringing goods, the distribution channels and the identity of third parties involved in the infringement.

11. There should be provisions for the disposal of infringing items by the law enforcement agencies without the court processes especially in cases of outright infringement as the continued infringement is likely to cause irreparable damage to the rights holder. This should be done while taking into account the rights of the defence and include prohibitory measures to prevent any further infringements from taking place.

12. The co-operation between the rights holders and the law enforcement agencies should be emphasised and the regulatory framework should include partnerships between the two parties.

13. The public awareness and education of the rights holders and law enforcement agencies on enforcement should be part of the policy. This will encompass the training of law enforcement agencies such as the customs, police, trading standards, the copyright offices etc. The awareness creation among users on the importance of copyright and related rights should also be included.

14. There should be a centralised agency to co ordinate the administration and enforcement of copyright and related rights such as the copyright office.

15. The increased importance of the digital environment including mobile telephony.

Appendix 3. Legal and Administrative Structures

	Legal Provisions	Copyright Offices	Judicial Enforcement	Police/ Inspectors	Border Measures	Private agencies
Kenya	Copyright Act of 2001	Kenya Copyright Board,	Injunctions, Anton Piller Orders, Damages, fines and custodial sentences	Inspection, seizure and arrest, detention, interrogation of suspects, powers of prosecution	Customs Department, Copyright inspectors	MCSK, KAMP, KEMAA,
Nigeria	Copyright Act of 1988 Optical Discs Act 2006	Nigerian Copyright Commission, Standards	Injunctions, Anton Piller Orders, Damages, fines and custodial sentences	Inspection, seizure and arrest, detention, interrogation of suspects, powers of prosecution	Customs Department, Copyright Inspectors.	IFPI MCSN
Senegal	Copyright Act of 1973, The Penal Code, Civil Procedure Code	The <i>Bureau sénégalais du droit d'auteur</i> (BSDA)	Injunctions, Damages, fines and custodial sentences	Inspection, seizure and arrest, detention, interrogation of suspects, powers of prosecution	Customs Department, Police, Magistrates	
South Africa	Copyright Act of 1978, Counterfeit of Goods Bill, Performers Act 1967.	Copyright Office (Companies and Intellectual Property Registration Office (CIPRO)	Injunctions, Anton Piller Orders, Damages, fines and custodial sentences	Inspection, seizure and arrest, detention, interrogation of suspects, powers of prosecution	Customs Department, Police, Inspectors	RISA, SAMRO SAFACT

Appendix 4. Interview transcripts

A. Questionnaire 1

1. What is the state of the current law in your country?
2. Piracy in the music industry is a big problem in Africa, how has your country tackled the problem of piracy?
3. Has the “Banderol” system been effective in the fight against piracy?
4. Is it possible to get the figures for the following:
 - the annual music sales
 - annual sales after the introduction of the banderol
 - the number of banderols sold annually
 - income from performing rights (royalties from radio and televisions stations and other public performances)
 - estimated value of pirated works
 - estimates on pirated music
5. How many musician organisations do you have in your country?
6. Under your copyright law, it is mandatory for Radio stations to pay royalties to the collecting societies, has this been enforced? Do the radio stations pay the royalties to the musicians?
7. Which are the main enforcement agencies? (Police, customs, judiciary etc).
8. Are the Judicial officers, customs officials and the police conversant with the copyright laws?
9. Have they been effective in the enforcement of copyright?
10. How many cases have been prosecuted in the past five years? Is it possible to get more information on the cases?
11. What are the main challenges you encounter in the enforcement of copyright law?
12. Please give a brief history on the development of the music industry in Senegal.
13. What is the government policy on music? Does the government give incentives to the music industry such as tax exemptions for the music instruments, organise concerts etc.

14. The World Bank has initiated the African Music Project and one of the beneficiaries was Senegal, what is the impact of this project on the music industry?
15. Which Government office/Department is responsible for copyright?
16. Border measures; How do you deal with cross border piracy?

Questionnaire 2

Copyright Enforcement in the Music Industry

La mise en application du droit d'auteur dans l'industrie musicale

I The Music Industry (latest figures)

L'industrie musicale (statistiques récentes)

1. What is the estimated value of the legitimate music industry in the country?
Quelle est la valeur estimée de l'industrie musicale légale (non-piratée) dans le pays ?
 - (a) Album sales
La vente des disques
 - (b) Performance copyright revenues
Rente due à l'exécution publique
 - (c) Mechanical copyright revenues
Rente due aux droits mécaniques
 - (d) Retail
Rente due à la vente au détail
2. How many CDs, Music cassettes are sold annually in the country?
La vente annuelle des CD, K7 dans le pays?
3. What is the ratio of foreign music sold to local music sold?
Quelle est la proportion/le rapport entre la vente de musique étrangère et celle de musique locale ?

4. How many record studios exist in the country?

Combien des studios d'enregistrement discographique existent-ils dans le pays?

5. How much of the local music is exported to Europe and the rest of Africa

Le taux de musique locale exporté en Europe et en Afrique?

6. Are there any local labels that dominate the market?

Est-ce qu'il y a des labels locaux qui dominent le marché?

II Anti Piracy Security Device

Dispositif de sécurité contre la piraterie

1. Since the anti piracy security device was introduced, how many holograms have been sold annually?

Depuis l'introduction du dispositif contre la piraterie, combien d'hologrammes ont été vendues?

2. Has this reduced the incidence of piracy in the music industry?

Est-ce que ce système a réduit l'incidence de la piraterie dans l'industrie discographique ?

3. What is the level of piracy in the music industry?

Quelle est le niveau de piraterie dans le secteur discographique ?

4. What difficulties are encountered in administering the APSD?

Quels sont les problèmes connus dans la gestion du système anti-piraterie ?

5. What is the role of the Copyright office in the administration of this device?

Quelle est le rôle du Bureau du droit d'auteur dans la gestion de ce système?

III Judicial enforcement of copyright in the music industry

Sanctions du droit d'auteur dans le secteur discographique

1. Criminal enforcement

- (a) How many cases of criminal infringement in the music industry have been brought to court annually?

Combien de cas juridiques pour violation du droits d'auteur dans le secteur discographique sont attendus devant le tribunaux chaque année

- (b) How many have been decided in a year?

Combien des décisions juridiques y a-t-il par an ?

- (c) How many convictions have been obtained in a year?

Il y a combien des condamnations par an?

- (d) How many dismissed, acquitted in one year

Combien d'acquittement ou fin de non-recevoir y-a-t-il par an?

- (e) What is the highest sentence or fine that has been handed down by the courts for music copyright infringement?

Quelle est la condamnation ou amende les plus sévères qui sont décidés par le tribunal suite à une violation du droit d'auteur ?

- (f) Number of pending cases

Combien des cas en attente y a-t-il?

2. Civil litigation

Litiges Civiles

- (a) How many civil raids have been conducted annually?

Combien de descentes civiles (par les forces de l'ordre ou Bureau du droit d'auteur) sont effectués par an ?

- (b) How many cases have been determined annually?

Combien des cas juridiques sont déterminés par an?

- (c) Highest damages awarded annually?

Les dommages-intérêts les plus élevées qui sont attribués par an?

- (d) How many cases have been dropped annually?

Les cas juridiques qui sont laissés tombés par an?

IV. Customs and Police

La Douane et la Police

1. What border measures are in place?

Quelles prescriptions spéciales concernant les mesures à la frontière?

2. How many pre recorded music cassettes, CDs and VCDs are legitimately imported into the country annually?

Combien des K7, CD et VCD d'oeuvres musicaux sont importés par an ?

3. How many pirated copies of music are impounded by the Customs officials annually?

Combien de produits illégaux sont saisis par la Douane par an?

4. Do police conduct routine raids?

Est-ce que la Police organise des descentes régulières?

5. For countries with Copyright Inspectors,

Pour les pays avec des Inspecteurs du droit d'auteur

6. How may raids have been conducted by the inspectors in a year?

Combien des descentes sont effectués par les inspecteurs par an ?

7. Have the inspectors improved the enforcement of copyright?

Est-ce que la mise en application du droit d'auteur est amélioré grâce aux inspecteurs dans le pays?

V. Trading Standards

Normes commerciales

1. How many cases have been determined using the trading standards instead of Copyright Law?

Combien des cas ont été jugé avec succès en se basant sur les normes commerciales ?

VI. Case law

Droit jurisprudentiel

1. Kindly provide recent case law or resources that can be used to access recent case law on music copyright infringement. I have tried to get information online but unfortunately this has not been possible. Please send the case summaries available but restricted to music copyright only.

Prier de fournir du droit jurisprudentiel ou référence pour accès au matériel récent du droit jurisprudentiel sur les attentes au droit d'auteur. J'ai essayé de trouver des informations en ligne, mais cela n'a pas été possible. Je vous serais (Je te serais) reconnaissante de bien vouloir une référé des cas disponible mais strictement limité aux attentes aux oeuvres musicaux.

Response from Senegal (July 2005)

1. The current copyright law in Senegal is the 1973 law, which was slightly revised in 1985. Its major weaknesses are as follows:
 - (a) It does not cover the neighbouring rights.
 - (b) It does not properly address the problem of piracy.
 - (c) It does not take into account the progress in new technologies.
 - (d) It does not give the right-owners the power to manage their rights effectively (the copyright office is a public office, the State appoints the staffs of this office, there is no commissioner of the accounts and there is no regular control and verification of the accounts).
4. Piracy has a serious impact in the musical industry in Senegal. I can say that at the moment, the piracy of musical tapes has gone down, however, giving way to digital piracy: all the new albums can be purchased in pirated CD versions just two days after the official launch of the new album. In the market, the pirated CD versions are not many, however this new form of piracy is a very lucrative

business for its main operators and it is more annoying because it affects the category of peoples who can afford the CDs.

It should be noted that due to the limited capacity of distribution of CDs or tapes of new albums throughout the territory, piracy is very effective and mainly used to satisfy the needs of the poor populations living in remote areas, in terms of access and acquisition to new albums. Also the fact that there are problems in respect of the distribution of new album, pirates can control the market of those Senegalese living overseas, who are generally ready to buy the music from their country regardless of the price.

Piracy makes it very difficult to make any profit from musical production in Senegal. Consequently, many business operators in Senegal are very reluctant to invest in the musical industry because it is a risky business.

5. With regards to the enforcement of the copyright law, since 1998, a bill has been discussed, but it has never been passed into law. The World Bank-funded project has provided opportunities to make progress on this question in Senegal, but political will and actions are very slow.
6. A copyright Bill was drafted by the Director of BSDA. With the assistance of the World Bank and the AMS, the State of Senegal commissioned an expert, Sybille Schlater to comment on this Bill. This expert submitted her report, which AMS approved for its rigour and quality. This report represents one of the basic documents that the main actors in the cultural sector in Senegal will use in the context of the discussions on the new copyright law. A particular fund of the World Bank, administered by an independent entity (PPIP) is used to finance the process of development of a new copyright law; a working group sitting in the office of the PPIP and comprising the Ministry of Culture, the Copyright Office of Senegal and professional organisations in the musical industry was set up. But lack of cohesion and understanding between the civil servants representing the Ministry of Culture in the working group and representatives of professional organisations make the activities of the working group very slow. If the discussions in this working group are carried out in the sense that they stress the

interests of professional actors of the cultural sector, such discussions may result in a good law. But if discussions are lead and geared by civil servants, I am not sure that we will have a good law.

7. About the banderol In Senegal the holograms (Marisella, this is a technical word. I am sure you know what it means) are used. These holograms were meant to stop certain musical producers from declaring less than the real quantity of phonogram's put in the market. The results have been positive: In 9 months of putting the system of holograms in place, the number of declared tapes that was culminating at about 300 000 a year increased to about 1000 000 a year. However, there are tensions between musical producers and the Copyright Office. Musical producers complaint that hologram's are very expensive (30 f CFA per unit) as they feel that hologram's can actually cost 10 f CFA per unit. Musical producers also complaint that there is no transparency in the management of money raised from holograms.

Response from Kenya (February 2006) or July 2005

I. Music Industry (latest figures)

As you know, with no formalised industry, all of this is guess-work. For much of it, I would go with the World Bank figures as there are no more up to date ones.

With regard to Performance and Mechanical copyright revenues, you should contact the general manager of the Music Copyright Society of Kenya as she would have this info, although I don't think MCSK is collecting Mechanical Rights Royalties as yet.
(jshamalla@mcsk.or.ke)

As you know, Johnnic of South Africa opened a new mega-media store at The Junction in Dagoretti Corner. This has been quite a good outlet, but has had an adverse effect on other shops. We are also getting stuff into Uchumi these days and talking to Nakumatt, but again, this could damage the specialist music shops, so figures remain much the same.

With regard to CDs, cassettes again use World Bank figures (ours have declined slightly this year).

Sales of legitimate local music are far ahead of foreign music (80/20?), while for pirate music in ratio is reduced (40/60?). We did an exercise for IFPI on this some time ago, but I haven't had time to go into my archives to check it out.

Nobody has any clue how many studios there are in the country, especially now that you can record in your garage! There are also a number of religious and educational facilities that have their own studios.

Not much if any local music is physically exported to Europe. This is generally done via agreements with specialist 'world music' people like Sterns, who manufacture/distribute world-wide, and more to the States than Europe. As for the rest of Africa, unless they understand the language or there is a special new beat, they have their own 'hip-hop', 'reggae' or whatever style artistes. The 'benga' sound from Kenya is pretty much out-dated now, as people have moved on. Anything exported would only be to surrounding countries.

With regard to local labels that dominate the market, this is split between secular and religious, and I would need more time to check into this.

III Judicial enforcement.

With the disaster of the Copyright Act/Board/banderol, nobody is taking action under this. Also, with our judicial system that takes years to hear/determine cases, it is all a bit too difficult and expensive.

The ones I know about are the ones that Albert Gicheru started, first as civil and then criminal, against one person in 2004. This has yet to be determined. Artistes usually take their recordings to somebody else to manufacture/distribute, even though producer had purchased the copyright, and has signed contracts. Albert is conducting his own case.

Torome also started a similar one about the same time - yet to be determined. He has an advocate, but I'm not sure who it is.

The parents of one deceased band member of Gidi Gidi Maji Maji are suing them/Gallo Music for payment of royalties following the re-recording of a track for the Gallo album release. However, I don't think that this is going to be successful, as the original local release did not indicate the deceased was one of the authors/composers, and nor is he registered as such with MCSK. The case is yet to be heard.

Nothing else has been done in the last year or so. As you know, the only success we had was under Trade Descriptions (Weights & Measures Dept), but their last Director seemed a little reluctant to do much, so nothing there since the end of 2004. Basically, everybody is waiting for the Counterfeit Goods Bill to come through, or for more changes to the Copyright Act.

IV Customs and Police

As you know, the people at the borders are customs and Kenya Bureau of Standards. Counterfeit goods meet standards, where there are any.

Customs can seize and destroy goods that are prohibited goods, either under the Customs Act, or which are illegal under any other Act, which makes them prohibited under Customs.

I'm not sure that even Customs can give the breakdowns on pre-recorded imported music! Certainly CDs and VCDs (and DVDs) all come in under the same tariff number. I don't know if I can get this info from Kenya Revenue Authority. Mr Kiratu who is in charge of the enforcement unit at the Kenya revenue Authority has assured me that they have stopped all illegal copies coming into the country, which is rather strange because it is still all over the place. How much they've actually impounded, I've no idea as they no longer call me when they find anything.

Do police conduct routine raids? Very few that we know of. The Board has yet to appoint inspectors as it is yet to become fully operational.

V Trading Standards

Trade Descriptions Act - We have had one in Mombasa - the accused pleaded guilty. Big mess up though, because the magistrate ruled that the goods be re-exported. Then it was discovered that a lot of it was pornographic, so it couldn't be exported! What happened after that, I don't know. This was some time ago, so I suppose you know about it.

Trade Marks - Kenya Industrial Property Institute usually ask Weights & Measures to act on their behalf. Part of the problem there is that to take action you really have to be either the registered user or to have a Power of Attorney.

I understand there is also the Sale of Goods Act that could be helpful, but I haven't read this so I don't know the provisions.

VI Case law

Nothing recent, as I said.

It is all as frustrating as ever. As I said, the useful director at Weights & Measures retired. His successor was reluctant to do much. He too has retired, and the new director has only just taken office.

The legal officer, who was so helpful and knowledgeable at Kenya Industrial Property Institute, has moved and become a State Counsel at the State Law Office.

The Counterfeit Goods Bill had a couple of contentious items that were never resolved. It was suggested that the issues be referred to the AG for an opinion. It was supposed to be presented to Parliament, but I hear it is still sitting with the Minister of Trade & Industry. The man that was in charge of the project has been moved to another, and the man that replaced him doesn't seem to be pushing at all.

What's happening with the amendments to the Copyright Act, I don't know. Nothing is happening with Kenya Association of Music Producers.

Response from Malawi (2006)

Copyright Enforcement in the Music Industry

1

- a) album sales estimated at K250,000,000
- b) Performance copyright revenue K72,000,000
- c) Mechanical copyright revenue K20,000,000
- d) Retail K500000000

2 Between 1,000,000 -2,000,000

3 85% local 15% foreign

4 10 recording studios

5 Negligible

6 all of them are local labels

II Anti Piracy Security Device

1 Between 1,000,000 to 2000,000

2 Yes it has

3 Would estimate at 15% for local but 80% for foreign works

4 Since it is not a hologram , there have been instances when it has been scanned hence our decision to move to hologram from July 2006

5 It is enforcement

III Judicial Enforcement of copyright in the music industry

I. Criminal enforcement

- a) an average of four annually
- b) Four
- c) Three
- d) One
- e) A fine of MK1500 or six months imprisonment
- f) One

2 Civil litigation

- a) An average of five
- b) Four
- c) Mk 300,000
- d) one

IV Customs and Police

Imported copyright works to be detained by customs subject to production of an approval letter from COSOMA

- 2) 15000
- 3) An average of 10000
- 4) They do at COSOMA's instigation
- 5) Five
- 6) Yes

Case law

I will have to visit the court to get the copies which will take a bit of time

BIBLIOGRAPHY

ARTICLES

Akester, P. (2005). Copyright and the P2P Challenge E.I.P.R. 27(3), 106-112.

Akester, P. and Lima F. (2005). Intellectual Property; Information Technology the Economic Dimension of the Digital Challenge: A Copyright Perspective. I.P.Q. 2005, 1, 69-81.

Asein, J. (1998-1999). TRIPS: Developing Countries and the Requirement of Appropriate Intellectual property Enforcement Infrastructure. 7 *Nigerian Juridical Review*. 33-54.

Becker, G.S. and Stigler, G J. (1974). Law Enforcement, Malfeasance and Compensation of Enforcers, 3 *Journal of Legal Studies* 1.

Burkitt, D. (2001). Copyright Culture- The History and Cultural Specificity of the Western Model of Copyright *I.P.Q.* 146-186.

Cohen, M. A. and Rubin, P. H. (1985). 'Private Enforcement of Public Policy', 3 *Yale J. on Reg* 188-189.

Collins, J. (1976). Ghanaian *Highlife*. *African Arts*, UCLA, California, Vol. 10, October.

Cornides, J. (2004). Human Rights and Intellectual Property: Conflict Convergence. *Journal of World Intellectual Property* 7 (2) 135-168.

Darko, D. (2000). 'Why Does Enforcement of Indonesia's Intellectual Property Laws Continue to be a Problem? *E.I.P.R* 22(10) 454-469.

Davies, G. (1995). The Convergence of Copyright and Authors' Rights' Rights Reality or Chimera? *I.I.C* (1995) 26 (6) 964-989.

- Deas, S.** (1998). Jazzing Up the Copyright Act? Resolving the Uncertainties of the United States Anti Bootlegging Law, *Hastings Communications and Entertainment Law Journal* 20 (3) 567-637.
- Dock, M.** (1974). Historie Internationale, Du Droit D'Auteur 79 RIDA pp. 126-205.
- Dratler, J.** (1999). IP Law, Commercial Creative and Industrial Property, *Law Journal Press*, NY 1A-100.
- Friedman, D.** (2005). "Rational Criminals and Profit Maximising Police: Gary Becker's Contribution to Economic Analysis of Law and Law Enforcement." available online at: http://davidfreidman.com/Academic/Becker_Chapter/Beck.
- Fry, R.** (2002). Copyright Infringement and Collective Enforcement *E.I.P.R.*, 24{11} 516-524.
- Gerhart, P.M.** (2000). Why Lawmaking for Global Intellectual Property Is Unbalanced, 22 *E.I.P.R.* 309-310.
- Ginsburg, J. C.** (1990). A Tale of Two Copyrights: Literary Property in Revolutionary France and America 64 *Tul. L. Rev.* 991, 992.
- Harbottle, G.** (1998). Private Prosecutions in Copyright Cases: Should they be Stopped *E.I.P.R.*, 20(8), 317-320.
- Harms, L.** (2004). The Role of the Judiciary in Enforcement of Intellectual Property Rights; Intellectual Property Litigation under Common Law System with Special Emphasis on the Experience in South Africa *E.I.P.R.* 26 (11).483-492.
- Hunair, K.** (2006). The Enforcement Directive: Its effects on UK Law, *E.I.P.R.* 28 (2), 92-99.
- Iddrisu, B. M.** (2001) A Developing Country's Perspective: Introduction to Intellectual Property Rights,' available online at:

<http://usinfo.state.gov/products/pubs/intelprp/perspect.htm> (Last accessed in July 2005).

Johnson, C. F. (1971). The Origins of the Stockholm Protocol' *Bulletin of the Copyright Society of the United States*, 91.

Joseph, P. (2005) What EU Harmonisation Really Means for Intellectual Property Owners *M.I.P.* 152 66-88.

Krent, H. J. (1989). Executive Control over Criminal Enforcement; Some Lessons from History, 38 *I Am. U.L. Rew* 275, 290-295.

Landau M. and Bierdman D. E. (1999), The Case for a Specialised Copyright Court: Eliminating the Jurisdictional Advantage, *Hastings Communication & Entertainment LJ* 717.

Landes W. M. and Posner, R. A. (1989) An Economic Analysis of Copyright Law, 18 *J. Legal. Stud.* 325.

Landes W. M. & Posner, R. A. (1975). The Private Enforcement of Law, 4 *J Leg. Studies* 1.

Lehmann, M. (1985). Theory of Property Rights and the Protection of Intellectual and Industrial Property, *IIC* 16.

Lowe. R. (2004). Intellectual Property-Proposed EU Directive-Measures and Procedures to Ensure the Enforcement of Intellectual Property Rights *E.I.P.R* 26 (7), N116-117.

Maskus, K. (2000). Intellectual Property Rights and Economic Development, *Case Western Journal of International Law*, vol.32 pp 471, 493.

Massa, C. H. and Strowel, A. (2004). The Scope of the Proposed IP Enforcement Directive: Torn Between the Desire to Harmonise Remedies and Combat Piracy. *E.I.P.R.*, 26(6), 244-253.

- Mcneilly, F.** (1968) The Enforceability of The Law, *No&ucir*; Vol 12 No. 1 February 47-64.
- Nasir, C.** (2005). From Scare Tactics to Surcharges and Other Ideas: Potential Solutions to Peer To Peer Copyright Infringement: Part 3, *Ent. L.R.* 16(5), 105-110).
- Nimmer, D.** (1995). The End of Copyright, *Vanderbilt Law Review* (October) 1385-1419.
- Nwauche, E. S.** (2003). An Evaluation of the African Regional Intellectual Property Rights Systems, *Journal of world Intellectual Property* Vol. 6 January 101-125.
- Ouma, M.** (2004). Copyright Act 2001 of Kenya: A New Era for Copyright Protection in Kenya, *Copyright Bulletin UNESCO*.
- Phillips, J.** (2001) The Risk that Rewards: Copyright Infringement Today. *Ent. L.R.*, 12(4) 103-106.
- Pound, R.** (1917). The Limits of Effective Legal Action, *International Journal of Ethics*, Vol. 27 No.2 January 1917.
- Rose, D.M.** (1998). Copyright in Stage Production Elements; Requirement of Originality and Record under English Law *Ent. L.R.* 30.
- Ricketson, S.** (1999). The Boundaries of Copyright: Its Proper Limitations and Expectations: International Conventions and Treaties, 1 *Intell. Prop Q.* 56. 75.
- Sen, A.** (2000). What's the Use of Music? The Role of the Music Industry in Africa World Bank Workshop on the Music Industry in Africa 2000. Washington DC.
- Shavell, S.** 2003). Economic Analysis of Public Enforcement and Criminal Law Working Paper 9698 NBER working paper series May 2003 available online at: <http://www.nber.org/papers/w9698>.

Stephenson M. C. (1994). Public Regulation of Private Enforcement: The Case for Expanding the role of administrative agencies *Virginia Law Review* Vol.91:93 93-170.

Story, A. (2003). Burn Berne: Why the Leading International Copyright Convention Must be Repealed. *Houston Law Review* Vol. 40 (3) p768.

Stromdale, C. (2006). The Problem with DRM *Ent. L.R.* 17(1), 1-6).

Subramaniam, A. and Watal, J. (2000). Can TRIPS Serve as an Enforcement Device for Developing Countries in the WTO? *Journal of International Economic Law*, vol.3, no. 3 pp 403-16.

Taylor, M.P. (1993). The Nature of the Infringement Problem in the Audio Fixation Industry, *E.I.P.R.* 1993, 15 (7) 255-259.

Thomson, S.L. (1964). The Authority of the Law, *Ethics*, Vol. 75, No. 1 October

Treacy, P. and Wry, A. (2006). IP Crimes; The Prospect for EU-Wide Criminal Sanctions- Long Road Ahead? *E.I.P.R.* 28(1) 1-4.

Yavorsky, S. (2006). Copyright- Music Piracy and File Sharing, *Ent. L.R.* 17(3), N23-25).

BOOKS

Altbach P. (ed.) *Copyright and Development*. Mass: Bellagio Publishing Network Research and Information Centre.

Asein, J. (2003). *Nigerian Copyright Law and Practice* Abuja, Nigerian Copyright Commission.

Asein, J. (2005). *Introduction to Nigerian Legal System*, Lagos, Ababa Press.

Abbot, F.Cottier T. and Gurry, F (eds.) (1999). *The International Intellectual Property System Commentary and Materials* Kluwer International, London.

Bainbridge, D. (2002). *Intellectual Property* London, Longman.

- Burnett, R.** (1996). *The Global Jukebox: The International Music Industry*. London and New York, Routledge.
- Cohen, J. et al** (2002). *Copyright in a Global Economy*, New York, Aspen Law.
- Cooper, J. and Devan R.** (1987). *Public Interest Law*, USA, Basil Blackwell.
- Cornish, W.R** (2003). *Intellectual Property: Patents, Copyrights, Trademarks and allied Rights* London Sweet and Maxwell.
- Davies, G.** (2002), *Copyright and Public Interest*, London, Sweet and Maxwell.
- Dean, O.H.** (2004) *Handbook on South African Copyright Law*, Juta, Johannesburg
- Drahos, P.** (1996). *A Philosophy of Intellectual Property* Aldershot: Dartmouth.
- Dworkin, G.** (1990). *Balackstone's Guide to the Copyright, Designs and Patent Act of 1998*, London, Blackstone Press Limited.
- Eggerston, T.** (1990). *Economic behaviour and institutions* Cambridge University Press.
- Endashaw, A.** (1996). *Intellectual Property Policy for Non-Industrial Countries* Dartmouth Publishing.
- Finger, M. J. and Schuler P.** (2003). *Poor People's Knowledge: Promoting IP in Developing Countries* Oxford University Press.
- Finnegan, R.** (1970). *Oral Literature in Africa*. Nairobi: Oxford University Press.
- Firth, S. and Marshall, L.** (eds.) (2004). *Music and Copyright*, 2nd Edition, Edindurgh, Edinburgh University Press.
- Garnett, K, Davies, G. and Harbottle, G.** (2005). *Copinger and Skone Jones on Copyright* (2005), London Sweet and Maxwell 15th Edition.
- Garnett, K. et al.** (1999). *Copinger and Skone James on Copyright* London, Sweet and Maxwell 1999 14th Edition.

- Gervais, D.** (2003). *The TRIPS Agreement: Drafting History and Analysis* London, Sweet and Maxwell.
- Goldstein, P.** (2001). *International Copyright Principles, Law and Practice* New York Oxford University Press.
- Goldstein, P.** (2003). *Copyright's Highway*, Stanford, Stanford University Press.
- Gorman, R.A. and Ginsburg J. C.** (1999). *Copyright Cases and Materials* 5th Edition Virginia, Lexis Law Publishing.
- Graham, R.** (1992). *The World of African Music: Stern's Guide to Contemporary African Music, Volume Two*. London: Pluto.
- Hanly, F and May, T.** (eds.) (1989) *Rhythms of the World*. London BBC Books.
- Herrington, W. and Thompson, G.** (2002). *Intellectual Property Rights and the United States International trade laws, USA*, Oceania Publications Inc.
- Hoekman, B. M et al** (eds.) (2002). *Development, Trade and the WTO; A Handbook*, Washington DC World Bank.
- Kamperman, A. and Heath C.** (eds.) (2005). *New Frontiers of Intellectual Property* Oxford, Hart Publishing. **Kuloba, R.** (1987). *Principles of Injunctions*, Nairobi Oxford University Press.
- Kuper, H. and Kuper L.** (eds.) (1996). *African Adaptation and Development*, University of California Press.
- Laswell, H. D.** (1992). *Jurisprudence for a Free Society*, New Haven Press, New Haven.
- Marshall, Lee.** (2005). *Bootlegging: Romanticism and Copyright in the Music Industry* London, Sage Publications.
- May, C.** (2000). *The Global Political Economy of Intellectual Property Rights*, London, Routledge.

- Middleton, J. (ed.) (1999)** *The Encyclopaedia of Sub-Saharan Africa*, Charles Scribner and Sons Reference Books.
- Mireille, E. (2003).** Choice of Law in Copyright and Related rights; Alternatives to the *Lex Protectionis* Kluwer, the Netherlands.
- Moore, A. (ed.) (1997).** Intellectual Property: Moral and Legal International Dilemmas Oxford Lanham.
- North, D.C. (1990).** Institutions, Institutional Change and Economic Performance, Cambridge, Cambridge University Press.
- Patterson, L. R. (1968).** *Copyright in Historical Perspective* Vanderbilt University Press.
- Ploman, E. W. and Hamilton C. (1980)** *Copyright, Intellectual Property in the Information Age* London Routledge and Keagan Paul.
- Posner, R. A. (1998).** *Economic Analysis of Law*. New York, Aspen Law and Business Publishers.
- Sinacore-Guinn, D (1993).** Collective Administration of Copyrights and Neighbouring Rights: International Practices, Procedures and Organisations, Little Brown and Company, Toronto.
- Sterling, J.A.L (2003).** *World Copyright Law*, London Sweet and Maxwell.
- Stewart, S.M. (1989).** International Copyright and Neighbouring Rights London Butterworths.
- Towse, R. (2001).** *Creativity, Incentive and Reward*, Cheltenham (UK) and Northampton, MA (USA): Edward Elgar.
- World Intellectual Property Organisation, (1997) *Introduction to Intellectual Property: Theory and Practice* 1997 London, Kluwer.

Vrins, O. and Schnieder M. (eds.) (2006) *Enforcement of Intellectual Property Rights Through Border Measures*, Oxford, Oxford University Press.

Watal, J. (2001). *Intellectual Property Rights in the WTO and Developing Countries*, The Hague, Kluwer Law International.

Williamson E.O. (1996). *The Mechanism of Governance*, Oxford, Oxford University Press.

PAPERS

Bacaly. M. (2006). 'Senegal: the Fight against Piracy: The BSDA Challenges the Conference of Heads of States' April 25, 2006 available online at: <http://www.wallAfrica.com>.

Bornkamm, J. (2004). 'Intellectual Property Litigation Under the Civil Law System; Experience In Germany' Presented at The Second Session of The Advisory Committee on Enforcement Geneva 2004 WIPO/ACE/2/3.

Collins, J. (2000). 'World Music- World Wide Sales' Paper presented at the Workshop of the World Bank and Policy Sciences Centre Inc on Developing the Music Industry in Africa', Washington DC June 20th 2000 available online at: http://www.worldbank.org/research/trade/pdf/IP_handout2_collins.pdf.

El Badrawi, H. (2004). 'Role of the Judiciary In the Enforcement of Intellectual Property Rights' Paper Presented At The Second Session of the Advisory Committee on Enforcement Geneva 2004 WIPO/ACE/2/6.

Faulder, S. (2004). 'The Music Business in the United Kingdom.' Paper presented at the WIPO/British Copyright Council on October 27 2004.

Gatui, J.P. (1990). 'The Challenges in the Enforcement of the Copyright Act.' Paper presented on behalf of the Police Commissioner at a Symposium on Copyright Law. 19-20 April 1990.

Hardy, P. (1997). 'Africa 1997: The Music Industry Markets of Ghana, Kenya, Nigeria and Zimbabwe'; Article from Music and Copyright 113, May 1997 as reported by Phil Hardy, 'The Possible Structures for the Collective Management of Authors' Royalties available at:

http://www.worldbank.org/research/trade/pdf/IP_handout/pdf.

Leesti, M. Pengelly, T. (2002). 'Institutional Issues for Developing Countries in Intellectual Property Policy Making, Administration and Enforcement.' Study Paper 9 for the Commission on Intellectual Property Rights Report. Pg. 21 available at: http://www.iprcommission.org/graphic/documents/study_papers.htm.

Iddrissu, M. B. (2004) 'A Decade of TRIPS-Enforcement Challenges' Paper presented at the EU Conference June 23-24, 2004, Brussels.

Letts, R. (2003). 'Effects of Globalisation on Music in Contrasting Countries: Australia, Germany, Nigeria, the Philippines and Uruguay' Report of a Research Project for the Many Musics program of the International Music Council available at: <http://www.mca.org.au/pdf/mmresfinal.pdf>.

Nzewi, O'dyke (2003). 'The Effects of Globalisation in the Nigerian Music Scene.' For the ManyMusics Project of the International Music Council, October 2003 available online at: <http://www.mca.org.au/pdf/mmresfinal.pdf>.

Sen, A. (2000). 'What's the Use of Music? The Role of the Music Industry in Africa' paper presented at the World Bank Workshop on the Music Industry in Africa 2000. Washington DC.

Sodipo, B. (2004). 'Intellectual Property Policy and Economic Development in Nigeria' Presented at the ESRC Seminar London October 2004.

Suthersanen, U. (2005) 'The Future of Copyright Reform in Developing Countries: Technological Interpretation, Localised Globalism and the "Public Interest" Rule.'
http://www.iprsonline.org/unctadictsd/bellagio/Bellagio2005/Suthersanen_final.pdf.

OFFICIAL DOCUMENTS AND INDUSTRY REPORTS

Annual Report of the Register of Copyrights 2003 (United States) available online at:
<http://www.copyright.gov/reports/annual/2003/index.html>.

UK Patent Office document, "Counter Offensive: An IP Crime Strategy" available at:
<http://www.patent.gov.uk/about/enforcement/ipbook.pdf>.

World Bank, "Urban development needs creativity: How creative industries affect urban areas. *Development Outreach* (2003).

World Bank report on the African Music Industry June 2000.

Cultural Industries Growth Strategy (CIGS) South African Music Industry, report done for the then Department of Arts, Culture, Science and Technology (DACST) 1998 available online at:

http://www.dac.gov.za/reports/music_pub_film_craft/musfin1.doc.

Siwek, Stephen. E. 'Copyright Industries in the US Economy' 2002 Report, International Intellectual Property Alliance available online at: <http://www.iipa.com>.

Copyright Industries in the United States Economy Report 2004 by Stephen E. Siwek prepared for the International Intellectual Property Alliance available online at:
http://www.iipa.com/pdf/2004_SIWEK_FULL.pdf.

IFPI Music Piracy Report 2002 and Commercial Piracy Report 2003 available at:
<http://www.ifpi.org>.

IFPI "What is Piracy" available online at:

http://www.ifpi.org/site-content/antipiracy/what_is_piracy.html.

IFPI Music Commercial Report 2005 available online at: <http://www.ifpi.org>.

RISA Chairman's Anti Piracy Report (2003). Available online at: http://www.risa.org.za/risa.php?content=agm2003_antipiracy.

The Potential for Enhanced India- Mercosur Trade in Creative Industries.” Background paper for UNCTAD by the Federation of Indian Chambers of Commerce and Industry (FCCI) (2004) at the UNCTAD 11th Session, Sao Paulo 13-18 June 2004. TD (X10 BP/13).

World Bank (2004) ‘Value Chain Analysis of the Music Industry in Kenya’

Report prepared for UNCTAD by Andy C Pratt, “The Music Industry in Senegal: The Potential for Economic Development.” 11th March 2004.

Letts, Richard (2003) ‘The Effects of Globalisation on Music in Five Contrasting Countries: Australia, Germany, Nigeria, the Philippines and Uruguay’. Report of a Research Project for the ManyMusics Program of the International Music Council.

Interim Report “Judicial Capacity Regarding Intellectual Property Enforcement and Dispute Settlement.” International Intellectual Property Institute 2002 available online at: <http://www.iipi.org/activities/Research>.

Wallis, R. and Kozul-Wright, Z ‘Best Practice Cases in the Music Industry and their Relevance for Government Policies in Developing Countries’ WIPO UNCTAD Report December 2001 available at:

<http://www.wipo.int/about-ip/en/studies/pdf/study-r-wallis.pdf>.

‘Development of Markets for the Music Industry in the SADC Region’ Document prepared for SADC Inter- Ministerial Conference on the Place and Role of Culture in

SADC Regional Integration Agenda available at:

<http://www.teledata.mz/sadccult/pmark.htm>.

International Intellectual Property Alliance 2003 Special 301 Report.

International Intellectual Property Alliance 2005 Special 301 Report.

Cultural Industries Growth Strategy: The South African Music Industry Final Report to the Department of Arts, Culture, Science and Technology November 1998 available online at <http://www.doc.gov.za/reports/music-pub-film-craft/musfin1.doc>.

Throsby, D. (2002). 'The Music Industry in the New Millennium: Global and Local Perspectives' Paper prepared for the Global Alliance for Cultural Diversity Division of Arts and Cultural Enterprise UNESCO, Paris October 2002 (on file with the author).

'From Structural Adjustment to Development Policy Lending: Has the World Bank Learnt from Past Experiences, and what are The Research and Policy Challenges? Available online at: <http://siteresources.worldbank.org>, and <http://www.worldbank.org>.

Economic Analysis of Public Law Enforcement and Criminal Law" Working paper 9698 NBER Working Paper Series May 2003 Chapter 24, available online at: <http://www.nber.org/papers/w9698>.

NEWSPAPER ARTICLES

Ayodo, Harold (2006). Gabriel Omolo: *Sasa ni Lunchtime*" The Standard May 13 2006.

Bigger, Taryn-Lee (2005) "Nigerian Copyright Commission Fighting Piracy With Hologram Security Device, [Online]. April 7 2005 available online at: <http://www.mio.za>.

Collins, John. (2003). The Ghanaian music industry: a quarter century of problems available at: http://www.ghanmusic.com/artman/publish/article_1052.shtml.

Collins, John. (2003) The Origins of Highlife in Ghana' Ghana Web July 27 2003 available online at:

http://www.ghanmusic.com/artman/publisher/printer_22.shtml.

Hilbur, R. (1998). Enhancing Creativity in Sampling saves music in 1997" The Star January 8 1998. (On file with the author).

Hills, F. (2003). Kwaito's looking sharp! On 9th April 2003 [Online] available at http://www.southafrica.info/ess_info/sa_glance/culture/kwaitodoc.htm. (Last accessed in May 2005).

Howard, D. (2005). Pirates of the 21st Century. Sunday Tribune 16 October 2005: 10.

Sewsunker, K. (2004) "Cars searched in Piracy Crackdown" Daily News 21 May 2004 available at: <http://www.iol.co.za>. (Last accessed July 2006).

THESIS AND DISSERTATIONS

Dean, O.H. (1979). *The Application of the Copyright Act, 1978, to Works made prior to 1979*, Unpublished Doctoral Thesis for the University of Stellenbosch, South Africa.

Sihanya B. (2003). *Constructing Copyright and Literary Creativity in Kenya* Unpublished Doctoral Thesis, Stanford University.